SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JUL 26 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,
Petitioner,

v.

THE UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Claims

Petition for Certiorari filed Feb. 20, 1974
Certiorari granted May 28, 1974

TABLE OF CONTENTS

	Page
Relevant Docket Entries	A. 1
Petition	A. 4
Commissioner's Order On Procedural Motions	A. 10
More Definite Statement	A. 11
Answer	A. 12
Stipulation and Amendment to Petition	A. 21
Amended Answer	A. 24
Report of Commissioner to the Court	A. 26
Statement Regarding Court of Claims Opinion and Judgment	A. 89

United States Court of Claims

Relevant Docket Entries

General Docket

Case No. 73-68

Title of Case

THE WILLIAMS & WILKINS COMPANY V.
THE UNITED STATES

Infringement of copyrights, Dept. H.E.W.

Feb 27 1968 Filing fee of $10 paid by plaintiff Petition Filed. 10 Copies of Petition to Defendant.

Apr 29 1968 Defendant's motion to dismiss the eighth count filed. Copies (2) to atty. ALLOWED JUN 4 1968, see comr's. order.

May 13 1968 Defendant's motion for a more definite statement filed. Copies (2) to atty. ALLOWED JUN 4 1968, see comr's. order.

May 23 1968 Plaintiff's response to defendant's motion to dismiss the eighth count and motion for a more definite statement filed. Copies (2) to deft.

May 31 1968 Defendant's reply to plaintiff's response to defendant's motion to dismiss, etc. filed. Copies (2) to atty.

Jun 4 1968 Commissioner's order on procedural motions filed. Copy to parties. (plaintiff to amend or supplement paragraph 12 within 30 days).

Jul 2 1968	Plaintiff's more definite statement (amendment to the petition) filed. Copies (10) to deft.
Sep 3 1968	Defendant's answer to petition filed. Copies (10) to atty.
Apr 9 1969	Deposition of Seymour I. Taine (per alledged stipulation between the parties) filed. Notice to parties.
Jun 25 1969	Court filed order referring case to Commissioner James F. Davis.
Jun 19 1970	Commissioner's memorandum of conference filed. Copy to parties.
Jul 23 1970	Stipulation [re amendment to petition] filed by defendant. Copy to atty.
Jul 23 1970	Plaintiff's amendment to petition filed. Copies (13) to deft.
Aug 20 1970	Defendant's amended answer filed. Copies (14) to atty.
Aug 24 1970	Commissioner's memorandum of pretrial conference filed. Copy to parties.
Oct 29 1970	Transcript of testimony (6 volumes) taken at Washington, D. C. on September 9 thru 16, 1970, together with plaintiff's exhibits 1 thru 10, 11A, 11-B-1 thru 11-B-6, 11-C-1 thru 11-C-17, 12, 12A, 13 thru 22, 24, 29, 30, 32, 33, 34, 38, 43, 46, 47, 48 and defendant's exhibits 1 thru 17, 21, 24 thru 26, 28 thru 34, 36, 39, 40, 42 thru 49, 51, 53, 54 thru 71, 74, 78-1 thru 78-11, 79-4 thru 79-9, 80-4 thru 80-9, 81-2, 81-6 thru 81-16, 83-1 thru 83-10, 87-3 thru 87-5, 87-7, 87-9 thru 87-11, 88 thru 115 filed. Notice to parties.
Jan 12 1971	Commissioner's order regarding filing of transcript together with one volume of testimony for defendant Dr. Michael T. Mcenany filed. Copy (of order-only) to parties.
Jan 12 1971	Commissioner's order closing proof, etc. filed. Copy to parties.

May 26 1971 Stipulation re testimony of Carl J. Green, Jr. filed by defendant, subject to the approval of the court. Copies (2) to atty. APPROVED MAY 27, 1971.

Feb 16 1972 Commissioner's opinion and findings of fact filed. Copies (5) to pltf. and (15) to deft.

Feb 18 1972 Commissioner's order re commissioner's report filed. Copy to parties.

Mar 16 1972 Defendant's notice of intention to except filed. Copies (2) to atty.

Mar 7 1973 Argued and submitted on the merits. Copies of referred to House Committee Report to be supplied by *Amicus Curiae*, Authors League of America, Inc.

Nov 27 1973 Petition dismissed. Opinion by Judge Davis. Dissenting opinion by Chief Judge Cowen in which Judge Kunzig joins. Dissenting opinion by Judge Nichols.

Feb 25 1974 Notice of filing in Supreme Court of a petition for writ of certiorari on February 20, 1974, No. 73-1279, filed.

Jun 4 1974 Order of the Supreme Court, dated May 28, 1974, granting the petition for writ of certiorari filed.

UNITED STATES COURT OF CLAIMS

THE WILLIAMS & WILKINS COMPANY,

Plaintiff,

—against—

THE UNITED STATES OF AMERICA,

Defendant.

PETITION

Plaintiff, The Williams & Wilkins Company, by its attorney, Alan Latman, for its petition herein, alleges:

AS AND FOR A FIRST COUNT

1. This count, as hereinafter more fully appears, arises under the Act of July 30, 1947, 61 Stat. 652, Title 17, United States Code (hereinafter "the Copyright Law") and is brought pursuant to the provisions of Title 28, United States Code, § 1498(b).

2. Plaintiff is a corporation duly organized and existing under the laws of the State of Maryland, with its principal place of business at 428 East Preston Street, Baltimore, Maryland, and is in the business of publishing books and periodicals, principally in the medical and scientific fields.

3. Prior to December 9, 1965, Victor A. McKusick, David Kaplan, S. B. Suddarth, M. E. Sevick and A. Edward Maumanee, all of whom then were and ever since have been citizens of the United States, and David Wise and W. Brian Hanley, who then were and ever since have been nationals of the United Kingdom created and wrote a work, in the form of a contribution to a periodical, entitled *The Genetic Mucopolysaccharidoses.*

4. Said work contains material which is wholly original with

the individuals named in the paragraph immediately preceding and is copyrightable subject matter under the Copyright Law.

5. Prior to the publication of said work as set forth in the paragraph immediately following, said individuals assigned all right, title and interest in and to said work to plaintiff.

6. On or about December 9, 1965, plaintiff secured statutory copyright in said contribution by publishing it, with the notice of copyright prescribed by the Copyright Law, on pages 445 to 483 of MEDICINE, Vol. 44, No. 6, November, 1965.

7. Since said date of publication plaintiff has duly complied in all respects with the provisions of the Copyright Law including, but not limited to the provisions of said law with respect to the deposit of copies and registration.

8. On or about December 13, 1965, the Register of Copyrights duly issued to plaintiff Certificate of Registration No. B231973 pertaining to said periodical.

9. Since said date of publication all copies of said periodical and said contribution thereto published or offered for sale by or under authority of plaintiff have been so published or offered for sale with notice of copyright in strict conformity with the Copyright Law.

10. All copies of said periodical and said contribution thereto made or manufactured by or under the authority of plaintiff have been printed and bound in strict conformity with the Copyright Law.

11. Since said date of publication plaintiff has been and still is the sole proprietor of all right, title and interest in and to the copyright in said work.

12. After said date of publication defendant, through its Department of Health, Education and Welfare, including but not limited to the Library of the National Institutes of Health and the National Library of Medicine thereof, and otherwise, infringed said copyright of plaintiff by copying, printing, reprinting, publishing, vending and distributing said work, all in violation of plaintiff's rights under § 1(a) of the Copyright Law.

13. Plaintiff gave actual written notice to the defendant of its infringement and, upon information and belief, defendant has continued to infringe after receipt of said notice.

AS AND FOR A SECOND COUNT

14. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 and 2 of this petition.

15. Prior to July, 1963, Ullrich Trendelenburg, who then was a citizen of Germany, created and wrote a work, in the form of a contribution to a periodical, entitled *Supersensitivity and Subsensitivity to Sympathomimetic Amines.*

16. Plaintiff repeats each and every allegation contained in paragraphs 4 and 5 of this petition, substituting the word "individual" for "individuals" in each said paragraph.

17. On or about July 8, 1963, plaintiff secured statutory copyright in said contribution by publishing it, with the notice of copyright prescribed by the Copyright Law, on pages 225 through 276 of PHARMACOLOGICAL REVIEWS, Vol. 15, No. 2, June, 1963.

18. Plaintiff repeats and realleges each and every allegation contained in paragraph 7 of this petition.

19. On or about July 15, 1963, the Register of Copyrights duly issued to plaintiff Certificate of Registration No. B49574 pertaining to said periodical.

20. Plaintiff repeats and realleges each and every allegation contained in paragraphs 9, 10, 11, 12 and 13 of this petition.

AS AND FOR A THIRD COUNT

21. Plaintiff repeats and realleges each and every allegation contained in paragraph 1 and 2 of the petition.

22. Prior to December 17, 1964, R. N. Hiramoto and M. Hamlin, both of whom then were and ever since have been citizens of the United States, created and wrote a work in the form of a contribution to a periodical, entitled *Detection of*

Two Antibodies in Single Plasma Cells by the Paired Fluorescence Technique.

23. Plaintiff repeats and realleges each and every allegation contained in paragraphs 4 and 5 of this petition.

24. On or about September 16, 1965 plaintiff secured statutory copyright in said contribution by publishing it, with the notice of copyright prescribed by the Copyright Law, in THE JOURNAL OF IMMUNOLOGY, Vol. 95, No. 2, August, 1965.

25. Plaintiff repeats and realleges each and every allegation contained in paragraph 7 of this petition.

26. On or about September 24, 1965 the Register of Copyrights duly issued to plaintiff Certificate of Registration No. B216408 pertaining to said periodical.

27. Plaintiff repeats and realleges each and every allegation contained in paragraphs 9, 10, 11, 12 and 13 of this petition.

AS AND FOR A FOURTH COUNT

28. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 and 2 of this petition.

29. Prior to December 18, 1964, B. T. Wood, S. H. Thompson and Gerald Goldstein, all of whom then were and ever since have been citizens of the United States, created and wrote a work in the form of a contribution to a periodical, entitled *Fluorescent Antibody Staining.*

30. Plaintiff repeats and realleges each and every allegation contained in paragraphs 4, 5, 24, 7, 26, 9, 10, 11, 12 and 13 of this petition.

AS AND FOR A FIFTH COUNT

31. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 and 2 of this petition.

32. Prior to December 17, 1964, John J. Cebra and Gerald Goldstein, both of whom then were and ever since have been citizens of the United States created and wrote a literary work

in the form of a contribution to a periodical entitled *Chromatographic Purification of Tetramethylrhodamine-Immune Globulin Conjugates And Their Use In The Cellular Localization of Rabbit Gamma-Globulin Polypeptide Chains.*

33. Plaintiff repeats and realleges each and every allegation contained in paragraphs 4, 5, 24, 7, 26, 9, 10, 11, 12 and 13 of this petition.

AS AND FOR A SIXTH COUNT

34. Plaintiff repeats each and every allegation contained in paragraphs 1 and 2 of this petition.

35. Prior to December 21, 1964, Velta Lazda and Jason L. Starr, both of whom then were and ever since have been citizens of the United States created and wrote a work, in the form of a contribution to a periodical entitled *The Stability of Messenger Ribonucleic Acid in Antibody Synthesis.*

36. Plaintiff repeats and realleges each and every allegation contained in paragraphs 4, 5, 24, 7, 26, 9, 10, 11, 12 and 13 of this petition.

AS AND FOR A SEVENTH COUNT

37. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 and 2 of this petition.

38. Prior to June, 1957, Ben M. Banks, B. I. Korelitz and L. Zetzel, who then were and ever since have been citizens of the United States created and wrote a work, in the form of a contribution to a periodical, entitled *The Course of Non Specific Ulcerative Colitis: Review of Twenty Years Experience and Late Results.*

39. Plaintiff repeats and realleges each and every allegation contained in paragraphs 4 and 5 of this petition.

40. On or about July 8, 1957 plaintiff secured statutory copyright in said contribution by publishing it, with the notice of copyright prescribed by the Copyright Law, on pages 983 through 1012 of GASTROENTEROLOGY, Vol. 32, No. 6, June, 1957.

41. Plaintiff repeats and realleges each and every allegation contained in paragraph 7 of this petition.

42. On or about July 30, 1957, the Register of Copyrights duly issued to plaintiff Certificate of Registration No. B663158 pertaining to said periodical.

43. Plaintiff repeats and realleges each and every allegation contained in paragraphs 9, 10, 11, 12 and 13 of this petition.

AS AND FOR AN EIGHTH COUNT

44. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 and 2 of this petition.

45. Upon information and belief defendant, through its Department of Health, Education and Welfare including, but not limited to the Library of the National Institute of Health and the National Library of Medicine thereof, and otherwise, infringed other copyrights of plaintiff by copying, printing, reprinting, publishing, vending and distributing works which are respectively the subjects of said copyrights, all in violation of plaintiff's rights under § 1(a) of the Copyright Law, Title 17, U.S. Code, and plaintiff requests leave of the court to amend this petition upon discovering the identity of such other works.

WHEREFORE, plaintiff demands that defendant be required to pay plaintiff such damages as plaintiff has sustained in consequence of defendant's infringements of its copyrights or, in lieu thereof, such damages as to the court shall appear proper within the provisions of § 101(b) of Title 17, United States Code, but not less than One ($1.00) Dollar for each infringing copy made, sold or distributed by or found in the possession of the defendant, its agents or employees.

Alan Latman
200 East 42nd Street
New York, New York
YU 6-6272
Attorney for Plaintiff

Arthur J. Greenbaum
Marvin S. Cowan
Of Counsel

A. 10

IN THE UNITED STATES COURT OF CLAIMS

No. 73-68

(Filed June 4, 1968)

THE WILLIAMS & WILKINS COMPANY v.
THE UNITED STATES

COMMISSIONER'S ORDER ON PROCEDURAL MOTIONS

1. Defendant's motion to dismiss only the Eighth Count of the Petition for failure to set forth specific works alleged to be copyrighted is considered as a procedural motion, is allowed, and paragraphs 44 and 45 of the Petition are hereby stricken.

2. Defendant's motion for a more definite statement is allowed with respect to paragraph 12 of the Petition, and plaintiff is hereby directed to amend or supplement said paragraph within 30 days.

Donald E. Lane
Commissioner

A. 11

IN THE UNITED STATES COURT OF CLAIMS

THE WILLIAMS & WILKINS COMPANY,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

No. 73-68

MORE DEFINITE STATEMENT

Pursuant to paragraph 2 of the Commissioner's Order on Procedural Motions, filed June 4, 1968, paragraph 12 of the Petition is hereby amended to read as follows:

12. After said date of publication defendant, through its Department of Health, Education and Welfare, and more particularly the Library of the National Institutes of Health, thereof, infringed said copyright of plaintiff by copying, printing, reprinting, publishing, vending and distributing said work, all in violation of plaintiff's rights under § 1(a) of the Copyright Law.

Plaintiff further amends the Petition by substituting the following for paragraph 20 of the Petition:

20. (a) Plaintiff repeats and realleges each and every allegation contained in paragraphs 9, 10, 11 and 13 of this petition.

(b) After said date of publication defendant, through its Department of Health, Education and Welfare, and more particularly its Library of the National Institutes of Health and National Library of Medicine thereof, infringed said copyright of plaintiff by copying, printing, reprinting, publishing, vending and distributing said work, all in violation of plaintiff's rights under § 1(a) of the Copyright Law.

Respectfully submitted,

ALAN LATMAN,
Attorney for Plaintiff

A. 12

IN THE UNITED STATES COURT OF CLAIMS

THE WILLIAMS & WILKINS COMPANY,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

No. 73-68

ANSWER

Now comes the defendant, by its Assistant Attorney General, and answers the petition filed in the above suit on February 27, 1968, and amended on July 2, 1968, as follows:

With Respect to the First Count:

1. With respect to paragraph 1 of the petition, defendant denies that this action arises under Title 17 of the United States Code, but defendant admits that this action is brought pursuant to Section 1498(b) of Title 28, United States Code.

2. With respect to paragraph 2 of the petition, defendant admits the same.

3. With respect to paragraph 3 of the petition, defendant is without knowledge or information sufficient to form a belief as to the allegations therein, and, therefore, denies the same.

4. With respect to paragraph 4 of the petition, defendant denies each and every allegations therein.

5. With respect to paragraph 5 of the petition, defendant is without knowledge or information sufficient to form a belief as to the allegations therein, and, therefore, denies the same.

6. With respect to paragraph 6 of the petition, defendant is without knowledge or information sufficient to form a belief as to the allegations therein, and, therefore, denies the same.

7. With respect to paragraph 7 of the petition, defendant is without knowledge or information sufficient to form a belief as to the allegations therein, and, therefore, denies the same.

8. With respect to paragraph 8 of the petition, defendant admits the same.

9. With respect to paragraph 9 of the petition, defendant is without knowledge or information sufficient to form a belief as to the allegations therein, and, therefore, denies the same.

10. With respect to paragraph 10 of the petition, defendant is without knowledge or information sufficient to form a belief as to the allegations therein, and, therefore, denies the same.

11. With respect to paragraph 11 of the petition, defendant is without knowledge or information sufficient to form a belief as to the allegations therein, and, therefore, denies the same.

12. With respect to paragraph 12 of the petition, defendant denies each and every allegation therein.

13. With respect to paragraph 13 of the petition, defendant denies each and every allegations therein.

With Respect to the Second Count:

14. With respect to paragraph 14 of the petition, defendant repeats and realleges each and every denial and each and every admission contained in paragraphs 1 and 2 of this answer.

15. With respect to paragraph 15 of the petition, defendant is without knowledge or information sufficient to form a belief as to the allegations therein, and, therefore, denies the same.

16. With respect to paragraph 16 of the petition, defendant repeats and realleges each and every denial contained in paragraphs 4 and 5 of this answer.

17. With respect to paragraph 17 of the petition, defendant is without knowledge or information sufficient to form a belief as to the allegations therein, and, therefore, denies the same.

18. With respect to paragraph 18 of the petition, defendant repeats and realleges each and every denial contained in paragraph 7 of this answer.

19. With respect to paragraph 19 of the petition, defendant admits the same.

20. With respect to paragraph 20(a) of the petition, defendant repeats and realleges each and every denial in paragraphs 9, 10, 11 and 13 of this answer.

With respect to paragraph 20(b) of the petition, defendant denies each and every allegation therein.

With Respect to the Third Count:

21. With respect to paragraph 21 of the petition, defendant repeats and realleges each and every denial and each and every admission contained in paragraphs 1 and 2 of this answer.

22. With respect to paragraph 22 of the petition, defendant is without knowledge or information sufficient to form a belief as to the allegations therein, and, therefore, denies the same.

23. With respect to paragraph 23 of the petition, defendant repeats and realleges each and every denial contained in paragraphs 4 and 5 of this answer.

24. With respect to paragraph 24 of the petition, defendant is without knowledge or information sufficient to form a belief as to the allegations therein, and, therefore, denies the same.

25. With respect to paragraph 25 of the petition, defendant repeats and realleges each and every denial contained in paragraph 7 of this answer.

26. With respect to paragraph 26 of the petition, defendant admits the same.

27. With respect to paragraph 27 of the petition, defendant repeats and realleges each and every denial in paragraphs 9, 10, 11, 12 and 13 of this answer.

With Respect to the Fourth Count:

28. With respect to paragraph 28 of the petition, defendant repeats and realleges each and every denial and each and every admission contained in paragraphs 1 and 2 of this answer.

29. With respect to paragraph 29 of the petition, defendant is without knowledge or information sufficient to form a belief as to the allegations therein, and, therefore, denies the same.

30. With respect to paragraph 30 of the petition, defendant repeats and realleges each and every denial and each and every admission contained in paragraphs 4, 5, 24, 7, 26, 9, 10, 11, 12 and 13 of this answer.

With Respect to the Fifth Count:

31. With respect to paragraph 31 of the petition, defendant repeats and realleges each and every denial and each and every admission contained in paragraphs 1 and 2 of this answer.

32. With respect to paragraph 32 of the petition, defendant is without knowledge or information sufficient to form a belief as to the allegations therein, and, therefore, denies the same.

33. With respect to paragraph 33 of the petition, defendant repeats and realleges each and every denial and each and every admission contained in paragraphs 4, 5, 24, 7, 26, 9, 10, 11, 12 and 13 of this answer.

With Respect to the Sixth Count:

34. With respect to paragraph 34 of the petition, defendant repeats and realleges each and every denial and each and every admission contained in paragraphs 1 and 2 of this answer.

35. With respect to paragraph 35 of the petition, defendant is without knowledge or information sufficient to form a belief as to the allegation therein, and, therefore, denies the same.

36. With respect to paragraph 36 of the petition, defendant repeats and realleges each and every denial and each and every admission contained in paragraphs 4, 5, 24, 7, 26, 9, 10, 11, 12 and 13 of this answer.

With Respect to the Seventh Count:

37. With respect to paragraph 37 of the petition, defendant repeats and realleges each and every denial and each and every admission contained in paragraphs 1 and 2 of this answer.

38. With respect to paragraph 38 of the petition, defendant is without knowledge or information sufficient to form a belief as to the allegations therein, and, therefore, denies the same.

39. With respect to paragraph 39 of the petition, defendant repeats and realleges each and every denial contained in paragraphs 4 and 5 of this answer.

40. With respect to paragraph 40 of the petition, defendant is without knowledge or information sufficient to form a belief as to the allegations therein, and, therefore, denies the same.

41. With respect to paragraph 41 of the petition, defendant repeats and realleges each and every denial contained in paragraph 7 of this answer.

42. With respect to paragraph 42 of the petition, defendant admits the same.

43. With respect to paragraph 43 of the petition, defendant repeats and realleges each and every denial in paragraphs 9, 10, 11, 12 and 13 of this answer.

44. Further answering, defendant avers:

(a) The periodical contribution alleged to be infringed in Count 1, as acknowledged on face thereof, resulted from work supported by funds, materials and facilities contributed by the defendant through its Department of Health, Education and Welfare, Public Health Service, and National Institutes of Health, pursuant to Grant No. GM10189 awarded to Victor A. McKusick and the Johns Hopkins University, Baltimore, Maryland, on or about September 12, 1962, and renewed or supplemented thereafter on or about September 16, 1963, December 19, 1963, August 25, 1964, July 30, 1965, August 22, 1966, September 14, 1966 and September 15, 1967, and Grant No. FR-35 issued to the Johns Hopkins University, Baltimore, Maryland, on or about April 28, 1960, and renewed or supplemented

on or about July 14, 1961, June 25, 1962, September 30, 1962, September 25, 1963, November 9, 1964, September 1, 1965, December 1, 1965, September 18, 1967 and November 17, 1967.

(b) Under the terms, conditions, and regulations applicable to Grants Nos. GM-10189 and FR-35 when the periodical contribution alleged to be infringed in Count 1 was created and published, the defendant has an express license to reproduce, translate, publish, use and dispose of the periodical contribution alleged to be infringed in Count 1.

45. Further answering, defendant avers:

(a) Defendant repeats and realleges the allegations set forth in paragraph 44(a) hereof.

(b) The periodical contribution alleged to be infringed in Count 2, resulted from work supported, maintained and paid for by funds, facilities and materials contributed by the defendant through its Department of Health, Education and Welfare, Public Health Service and National Institutes of Health, pursuant to Grant No. NB 01713 awarded to Ullrich G. Trendelenburg and the Harvard Medical School, Boston, Massachusetts, on or about February 6, 1962 and renewed and supplemented on or about January 10, 1963, January 28, 1964, January 27, 1965, and March 28, 1966.

(c) The periodical contribution alleged to be infringed in Count 4 as acknowledged on the face thereof, resulted from work supported, maintained and paid for by funds, facilities and materials contributed by the defendant through its Department of Health, Education and Welfare, Public Health Service and National Institutes of Health pursuant to Grant No. CA-03726 (also known as C-3726) awarded to Gerald Goldstein and the University of Virginia School of Medicine, Charlottesville, Virginia, on or about September 1, 1960, and renewed or supplemented on or about July 13, 1961, July 18, 1962, July 17, 1963, March 30, 1964, July 13, 1964, July 26, 1965, October 13, 1966, November 30, 1966 and February 2, 1968.

(d) The periodical contribution alleged to be infringed in Count 5, as acknowledged on the face thereof, resulted from work supported, maintained and paid for by funds, facilities

and materials contributed by the defendant through its Department of Health, Education and Welfare, Public Health Service and National Institutes of Health pursuant to Grant No. AI 05042 awarded to John J. Cebra and the University of Florida, Gainesville, Florida, on or about December 31, 1962, and renewed or supplemented on or about August 26, 1963, September 3, 1964 and September 10, 1965.

(e) The periodical contribution alleged to be infringed in Count 6, as acknowledged on the face thereof, resulted from work supported, maintained and paid for by funds, facilities and materials contributed by the defendant through its Department of Health, Education and Welfare, Public Health Service and National Institutes of Health pursuant to the provisions of Grant No. AI-05988 awarded to Jason L. Starr and Northwestern University, Evanston, Illinois, on or about June 26, 1964.

(f) By virtue of funds, materials and facilities contributed, awarded, and granted to the authors and creators of the periodical contributions alleged to be infringed in Counts 1, 2, 4, 5 and 6 in support of, in the maintenance of, and in payment for the works resulting in the aforesaid periodical contributions, the defendant has a license implied in fact and in law to photocopy or otherwise reproduce or to cause to be photocopied or otherwise reproduced for its own use and for the use of its officials, employees, or other persons to whom the duty of providing photocopies or other reproductions has been imposed by statute upon the defendant.

46. Further answering, defendant avers with respect to Count 2 of the petition that it is not liable to plaintiff under the allegations made therein, and, further, that its National Library of Medicine is authorized under the provisions of the Act of August 3, 1956, 70 Stat. 960 (42 U.S.C. § 276) to make available to public and private agencies and organizations, institutions and individuals materials pertinent to medicine through photographic or other copying procedures.

47. Further answering, defendant avers that all of the periodical contributions alleged to be infringed and each of them contain, report and describe facts, observations, phenomena,

methods and procedures of a medical or scientific nature, which are uncopyrightable and in the public domain, and which may be copied, published, and distributed without liability to plaintiff and, further, that those portions of the aforesaid periodical contributions not facts, observations, phenomena, methods o. procedures are incidental, insignificant and not substantial so that liability for copying, publishing or distributing such portions, if any, is de minimis and not compensable in this Court.

48. Further answering, defendant avers

(a) the defendant through its Department of Health, Education and Welfare and the National Institutes of Health is empowered and directed under the provisions of the Act of July 1, 1944, 58 Stat. 691, as amended (42 U.S.C. § 241) to conduct research, investigations, experiments, demonstrations and studies relating to the causes, diagnoses, treatment, control and prevention of physical and mental diseases and impairments in man,

(b) the ready accessibility of medical and scientific materials for purposes of study, comparison, inspection and application is a necessary and essential condition in order that the aforesaid statutory mission may be accomplished,

(c) the defendant through its Department of Health, Education and Welfare and the National Institutes of Health, has instituted and operated a system of providing photocopies to qualified scientists and medical researchers whereby they may obtain copies of pertinent medical and scientific materials for use in their research, investigations, experiments, demonstrations and studies,

(d) the purpose of a statutory copyright is to promote the progress of science, and the useful arts,

(e) the imposition upon defendant of liability for infringement of statutory copyright for providing the aforesaid photocopying services to its scientists and medical researchers will thwart, hinder, and impede the performance of the statutory mission of the National Institutes of Health and will not serve to promote the progress of science and the useful arts.

49. Further answering, defendant avers that the acts alleged in the petition are a fair use of works alleged to be copyrighted.

Respectfully submitted,

EDWIN L. WEISL, Jr.
Assistant Attorney General

THOMAS J. BYRNES
Attorney, Department of Justice

A. 21

IN THE UNITED STATES COURT OF CLAIMS

THE WILLIAMS & WILKINS COMPANY,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

No. 73-68

STIPULATION

IT IS HEREBY STIPULATED AND CONSENTED, by and between the attorneys for the respective parties hereto, that pursuant to Rule 39(a) of this Court, plaintiff may amend its petition by adding an eighth count, as set forth in Exhibit A hereto.

ALAN LATMAN
Attorney for Plaintiff

WILLIAM D. RUCKELSHAUS
Assistant Attorney General

THOMAS J. BYRNES
Attorney, Department of Justice

AMENDMENT TO PETITION

Plaintiff, The Williams & Wilkins Company, by its attorney, Alan Latman, for an amendment to its petition herein, consisting of the addition of an Eighth Count, alleges:

AS AND FOR AN EIGHTH COUNT

44. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 and 2 of this petition.

45. Prior to December 23, 1959, R.G.F. Parker, who then was a citizen of the United Kingdom, created and wrote a work in the form of a contribution to a periodical, entitled *Occlusion of the Hepatic Veins in Man.*

46. Said work contains material which is wholly original with said R.G.F. Parker and is copyrightable subject matter under the copyright law.

47. Prior to the publication of said work, as set forth in the paragraph immediately following, said R.G.F. Parker assigned all right, title and interest in and to said work to plaintiff.

48. On or about December 23, 1959, plaintiff secured statutory copyright in said contribution by publishing it with notice of copyright prescribed by the copyright law on pages 369 through 402 of MEDICINE, Volume 38, No. 4, December, 1959.

49. Plaintiff repeats and realleges each and every allegation contained in Paragraph 7 of the petition.

50. On or about December 24, 1959 the Register of Copyrights duly issued to plaintiff Certificates of Registration No. B809926 pertaining to said periodical.

51. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 9, 10 and 11 of the petition.

52. After said date of publication, defendant, through its Department of Health, Education and Welfare, including the National Library of Medicine and National Institutes of Health,

thereof, infringed said copyright of plaintiff by copying, printing, reprinting, publishing, vending and distributing said work, all in violation of plaintiff's rights under § 1(a) of the copyright law.

53. Plaintiff repeats and realleges each and every allegation contained in Paragraph 13 of the petition.

Alan Latman
200 East 42nd Street
New York, New York
YU 6-6272
Attorney for Plaintiff

Arthur J. Greenbaum
Marvin S. Cowan
Of Counsel

IN THE UNITED STATES COURT OF CLAIMS

THE WILLIAMS & WILKINS COMPANY,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

No. 73-68

AMENDED ANSWER

Now comes the defendant, by its Assistant Attorney General, and answers the amendment to the petition filed herein on July 23, 1970, as follows:

With Respect to the Eighth Count:

50. With respect to paragraph 44 of the amended petition, defendant repeats and realleges each and every denial and each and every admission contained in paragraphs 1 and 2 of the answer.

51. With respect to paragraph 45 of the amended petition, defendant is without knowledge or information sufficient to form a belief as to the allegations therein, and, therefore, denies the same.

52. With respect to paragraph 46 of the amended petition, defendant is without knowledge or information sufficient to

form a belief as to the allegations therein, and, therefore, denies the same.

53. With respect to paragraph 47 of the amended petition, defendant is without knowledge or information sufficient to form a belief as to the allegations therein, and, therefore, denies the same.

54. With respect to paragraph 48 of the amended petition, defendant is without knowledge or information sufficient to form a belief as to the allegations therein, and, therefore, denies the same.

55. With respect to paragraph 49 of the amended petition, defendant repeats and realleges each and every denial contained in paragraph 7 of the answer.

56. With respect to paragraph 50 of the amended petition, defendant admits the same.

57. With respect to paragraph 51 of the amended petition, defendant repeats and realleges each and every denial in paragraphs 9, 10 and 11 of the answer.

58. With respect to paragraph 52 of the amended petition, defendant denies each and every allegation therein.

59. Further answering the amended petition, defendant repeats and realleges each and every defense set forth in paragraphs 46, 47, 48 and 49 of defendant's answer filed September 3, 1968.

Respectfully submitted,

WILLIAM D. RUCKELSHAUS
Assistant Attorney General

THOMAS J. BYRNES
Attorney, Department of Justice

In the United States Court of Claims

No. 73-68

(Filed FEB 16 1972)

THE WILLIAMS & WILKINS COMPANY v. THE UNITED STATES

REPORT OF COMMISSIONER TO THE COURT*

Alan Latman, attorney of record, for plaintiff. *Arthur J. Greenbaum*, of counsel.

Thomas J. Byrnes, with whom was *Assistant Attorney General L. Patrick Gray, III*, for defendant.

Weil, Gotshal & Manges, for the Association of American Publishers, Inc., amicus curiae. *Horace S. Manges, Marshall C. Berger* and *Arthur F. Abelman*, of counsel.

Irwin Karp, for The Authors League of America, Inc., amicus curiae.

Perry S. Patterson, for the American Library Association, amicus curiae. *William D. North, Ronald L. Engel, James M. Amend, John A. Waters*, and *Kirkland, Ellis, Hodson, Chaffetz & Masters*, of counsel.

Cox, Langford & Brown, for the Association of Research Libraries, Medical Library Association and American Association of Law Libraries, amici curiae. *Philip B. Brown* and *John P. Furman*, of counsel.

OPINION

DAVIS, *Commissioner:* This is a copyright infringement suit under 28 U.S.C. § 1498(b).[1] Plaintiff alleges that defend-

*The opinion, findings of fact, and recommended conclusion of law are submitted under the order of reference and Rule 134(h).

[1] Prior to 1960, § 1498 provided only for patent infringement suits against the United States. In 1960, Congress amended § 1498 to make the United States liable also for copyright infringement, pursuant to title 17, U.S.C., the copyright statute. This is the first copyright case to reach trial in this court.

454-788—72——1

ant's Department of Health, Education, and Welfare, through its agencies, the National Institutes of Health (NIH) and the National Library of Medicine (NLM), has infringed plaintiff's copyrights in medical journals by making unauthorized photocopies of articles from such journals. This suit is one of first impression: raises long-troublesome and much-discussed issues of library photocopying of copyrighted materials;[2] and requires for resolution the "judgment of Solomon" if not also the "dexterity of Houdini."[3] The following organizations sought (and were granted) leave to file briefs as amici curiae: The Authors League of America, Inc., and the Association of American Publishers, Inc. (in support of plaintiff); and the American Library Association, the Association of Research Libraries, the Medical Library Association, and the American Association of Law Libraries (in support of defendant). Those briefs, along with the briefs filed by the parties, have been of great assistance. I hold that defendant has infringed plaintiff's copyrights and that plaintiff is entitled to recover "reasonable and entire compensation" as provided by § 1498(b).

For convenience and for orderly discussion of the many complex problems raised by this case, the opinion is divided into three parts. Part I is a synopsis of the material facts, most of which are not in dispute. Detailed facts are set out

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[2] See, e.g., B. Varmer, Photoduplication of Copyrighted Material by Libraries, Study No. 15, Copyright Law Revision. Studies Prepared for Senate Comm. on the Judiciary, 86th Cong., 2d Sess. (1960) [hereinafter cited as the Varmer study]; G. Sophar and L. Heilprin, The Determination of Legal Facts and Economic Guideposts with Respect to the Dissemination of Scientific and Educational Information as it is Affected by Copyright—A Status Report, Final Report. Prepared by The Committee to Investigate Copyright Problems Affecting Communication in Science and Education, Inc., for the U.S. Department of Health, Education, and Welfare, Project No. 70793 (1967) [hereinafter cited as Sophar and Heilprin report]; Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law to the House Comm. on the Judiciary, 87th Cong., 2d Sess. at 25–26 (1961) [hereinafter cited as the Register's Report]; Project—New Technology and the Law of Copyright: Repography and Computers, 15 U.C.L.A. L. Rev. 931 (1968) [hereinafter cited as UCLA Project]; V. Clapp, Copyright—A Librarian's View, Prepared for the National Advisory Commission on Libraries, Association of American Libraries (1968); Schuster and Bloch, Mechanical Copyright, Copyright Law, and the Teacher, 17 Clev.-Mar. L. Rev. 299 (1968); "Report on Single Copies"—Joint Libraries Committee on Fair Use in Photocopying, 9 Copyright Soc'y Bull. 79 (1961–62).

[3] To borrow a phrase from Mr. Justice Fortas in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 402 (1968), *rehearing denied*, 393 U.S. 902. There, the Supreme Court grappled with another vexing copyright problem—cable antenna television (CATV).

in the findings of fact. Part II deals with the copyright law as it applies to resolution of the case. Part III deals with some ancillary matters.

I

Plaintiff, though a relatively small company, is a major publisher of medical journals and books. Plaintiff publishes 37 journals, dealing with various medical specialties. The four journals in suit are *Medicine*, *Journal of Immunology*, *Gastroenterology*, and *Pharmacological Reviews*. *Medicine* is published by plaintiff for profit and for its own benefit. The other three journals are published in conjunction with specialty medical societies which, by contract, share the journals' profits with plaintiff. The articles published in the journals stem from manuscripts submitted to plaintiff (or one of the medical societies) by physicians or other scientists engaged in medical research. The journals are widely disseminated throughout the United States (and the world) in libraries, schools, physicians' offices, and the like. Annual subscription prices range from about $12 to $44; and, due to the esoteric nature of the journals' subject matter, the number of annual subscriptions is relatively small, ranging from about 3,100 (*Pharmacological Reviews*) to about 7,000 (*Gastroenterology*). Most of the revenue derived from the journals comes from subscription sales, though a small part comes from advertising.[4] The journals are published with notice of copyright in plaintiff's name. The notice appears at the front of the journal and sometimes at the beginning of each article. After publication of each journal issue (usually monthly or bimonthly) and after compliance with the requisite statutory requirements, the Register of Copyrights issues to plaintiff certificates of copyright registration.

NIH, the Government's principal medical research organization, is a conglomerate of institutes located on a multiacre campus at Bethesda, Maryland. Each institute is concerned with a particular medical specialty, and the institutes conduct their activities by way of both intramural research and grants-in-aid to private individuals and organizations. NIH employs over 12,000 persons—4,000 are science professionals and 2,000 have doctoral degrees. To assist its intra-

[4] E.g., the November 1956 issue of Medicine has 86 pages, four of which carry commercial product advertising. The August 1965 issue of Journal of Immunology has 206 pages, nine of which carry commercial product advertising.

mural programs, NIH maintains a technical library. The library houses about 150,000 volumes, of which about 30,000 are books and the balance scientific (principally medical) journals. The library is open to the public, but is used mostly by NIH in-house research personnel. The library's budget for 1970 was $1.1 million.

The NIH library subscribes to about 3,000 different journal titles, four of which are the journals in suit. The library subscribes to two copies of each of the journals in suit. As a general rule, one copy stays in the library reading room and the other copy circulates among interested NIH personnel. Demand by NIH research workers for access to plaintiff's journals (as well as other journals to which the library subscribes) is usually not met by in-house subscription copies. Consequently, as an integral part of its operation, the library runs a photocopy service for the benefit of its research staff. On request, a researcher can obtain a photocopy of an article from any of the journals in the library's collection. Usually, researchers request photocopies of articles to assist them in their on-going projects; sometimes photocopies are requested simply for background reading. In any event, the library does not monitor the reason for requests or the use to which the photocopies are put. The photocopies are not returned to the library; and the record shows that, in most instances, researchers keep them in their private files for future reference.

Four regularly assigned employees operate the NIH photocopy equipment. The equipment consists of microfilm cameras and Xerox copying machines. In 1970, the library photocopy budget was $86,000 and the library filled 85,744 requests for photocopies of journal articles (including plaintiff's journals), constituting about 930,000 pages. On the average, a journal article is 10 pages long, so that in 1970, the library made about 93,000 photocopies of articles.

NLM is located on the Bethesda campus of NIH. NLM was formerly the Armed Forces Medical Library. In 1956, Congress transferred the library from the Department of Defense to the Public Health Service (renaming it the National Library of Medicine), and declared its purpose to be "* * * to aid the dissemination and exchange of scientific and other information important to the progress of medicine and to the public health * * *." 42 U.S.C. § 275 (1970). NLM is a repository of much of the world's medical literature. NLM is in es-

sence a "librarians' library." As part of its operation, NLM cooperates with other libraries and like research-and-education-oriented institutions (both public and private) in a so-called "interlibrary loan" program. Upon request, NLM will loan to such institutions, for a limited time, books and other materials in its collection. In the case of journals, the "loans" usually take the form of photocopies of journal articles which are supplied by NLM free of charge and on a no-return basis. The term "loan" therefore is a euphemism when journal articles are involved. NLM's loan policies are fashioned after the General Interlibrary Loan Code, which is a statement of self-imposed regulations to be followed by all libraries which cooperate in interlibrary loaning. The Code provides that each library, upon request for a loan of materials, shall decide whether to loan the original or provide a photoduplicate. The Code notes that photoduplication of copyrighted materials may raise copyright infringement problems, particularly with regard to "photographing *whole issues* of periodicals or books with *current copyrights*, or in making *multiple copies* of a publication." [Emphasis in original text.] NLM, therefore, will provide only one photocopy of a particular article, per request, and will not photocopy on any given request an entire journal issue. NLM, as well as other libraries, justifies this practice on the basis of a so-called "gentlemen's agreement," written in 1935 by the National Association of Book Publishers and the Joint Committee on Materials for Research (representing the libraries), which states in part, "A library * * * owning books or periodical volumes in which copyright still subsists may make and deliver a single photographic reproduction * * * *of a part thereof* to a scholar representing in writing that he desires such reproduction in lieu of loan of such publication or in place of manual transcription and solely for the purposes of research * * *." [Emphasis supplied.] Each photocopy reproduced by NLM contains a statement in the margin, "This is a single photostatic copy made by the National Library of Medicine for purposes of study or research in lieu of lending the original."

In 1968, a representative year, NLM received about 127,000 requests for interlibrary loans. Requests were received, for the most part, from other libraries or Government agencies. However, about 12 percent of the requests came from private or commercial organizations, particularly drug companies.

Some requests were for books, in which event the book itself was loaned. Most requests were for journals or journal articles; and about 120,000 of the requests were filled by photocopying single articles from journals, including plaintiff's journals. Usually, the library seeking an interlibrary loan from NLM did so at the request of one of its patrons. If the "loan" was made by photocopy, the photocopy was given to the patron who was free to dispose of it as he wished. NLM made no effort to find out the ultimate use to which the photocopies were put; and there is no evidence that borrowing libraries kept the "loan" photocopies in their permanent collections for use by other patrons.

Defendant concedes that within the pertinent accounting period, NLM and the NIH library made at least one photocopy of each of eight articles (designated by plaintiff as the Count I-to-Count VIII articles) from one or more of the four journals in suit. Defendant also concedes that plaintiff is the record owner of copyright registrations on the journals. That would appear to end the matter in plaintiff's favor, for § 1 of the copyright statute (17 U.S.C.) says that the copyright owner "* * * shall have the exclusive right: (a) to print, reprint, publish, copy and vend the copyrighted work * * *"; and § 3 of the statute says that, "* * * [t]he copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title." Simply stated, this means that each article in plaintiff's journals is protected from infringement to the same extent as the entire journal issue. *Advertisers Exch., Inc.* v. *Laufe*, 29 F. Supp. 1 (W.D. Pa. 1938); *King Features Syndicate* v. *Fleischer*, 299 F. 533 (2d Cir. 1924).[5]

Despite plaintiff's prima facie showing of infringement, the Government and its amici raise a host of arguments why the libraries should not be held liable for infringement. The

[5] One argument made by defendant to justify the copying of single articles from plaintiff's journals is that each article is but "part" of a journal issue, which in turn is but "part" of a journal volume; and, accordingly, defendant says, its libraries have not copied an "entire" copyrighted work. Section 3 of 17 U.S.C. fully meets that argument, for it is undisputed that plaintiff could publish and seek copyright registration on each article separately. As stated in H.R. Rep. No. 2222, 60th Cong., 2d Sess. 10 (1909):

> Section 3 [of the Copyright Act] does away with the necessity of taking a copyright on the contributions of different persons included in a single publication * * *.

arguments boil down to five defenses: (a) nonownership of copyright, (b) real party in interest, (c) noninfringement, (d) fair use, and (e) license.

II

The nonownership defense

Defendant says that plaintiff is not the "proprietor" of copyright in the Count I-to-Count VIII articles (17 U.S.C. § 9), and therefore does not have standing to bring this suit. As noted earlier, defendant concedes that plaintiff is the owner of record title of copyright registrations on the journals in which the articles appear; and defendant also concedes that plaintiff is entitled to a "presumption that it is the owner of the individual articles in the journals published by it." 17 U.S.C. §§ 3, 209. However, defendant says the presumption is rebutted by evidence that the authors of the articles did not make written assignment to plaintiff of their proprietary interest in the manuscripts from which the articles stemmed and that the authors were not paid monetary compensation for their manuscripts. From this, defendant urges that the authors did not assign to plaintiff ownership of their manuscripts, and, at most, granted to plaintiff only a license to publish the articles. Defendant relies on *Morse* v. *Fields*, 127 F. Supp. 63, 65, 104 USPQ 54, 55 (S.D. N.Y. 1954), which held that "* * * a general copyright in an issue of a periodical (a "blanket" copyright) does not protect the rights in a particular contributed article unless such rights had been previously assigned to the publisher." Defendant also cites *Kinelow Publishing Co.* v. *Photography-in-Business, Inc.*, 270 F. Supp. 851, 155 USPQ 342 (S.D. N.Y. 1967), and *Brattleboro Publishing Co.* v. *Winmill Publishing Co.*, 250 F. Supp. 215, 149 USPQ 41 (D. Vt. 1966), *aff'd*, 369 F. 2d 565, 151 USPQ 666 (2d Cir. 1966), for the proposition that, absent an express assignment, the author (rather than the publisher) of a copyrightable work retains title to the work, even though it is published as part of a composite on which there is blanket copyright in the publisher's name.

The record does not support defendant and the cited cases are not apposite. At the outset, it is pertinent to note this court's decision in *Dorr-Oliver, Inc., et al.* v. *United States*, 193 Ct. Cl. 187, 432 F. 2d 447, 167 USPQ 474 (1970), which held that the owner of record title of a patent (and by anal-

ogy, a copyright registration) is the proper party to bring suit for infringement in this court under 28 U.S.C. § 1498, and that equitable rights of ownership of strangers to the suit cannot be raised as defenses against the legal title holder. *See also Widenski* v. *Shapiro, Bernstein & Co.*, 147 F. 2d 909, 64 USPQ 448 (1st Cir. 1945). As a matter of law, therefore, it would seem that defendant cannot assert the ownership defense since by doing so, it seeks to raise equities of persons not parties to the suit. However, even if that issue can be raised, defendant cannot prevail on the merits. Authors of two of the articles in suit testified at trial, and neither asserted an interest (legal or equitable) in their respective articles. It is reasonable to infer that testimony of the other authors would be the same, for the evidence supports the conclusion that by custom of long standing and absent any written or oral agreement to the contrary, authors who submit manuscripts to medical journals do so on the implied understanding that the publisher will obtain statutory copyright on the journal (and the individual articles therein) in the journal's name and for the journal's benefit, and that the copyright will be enforced by the copyright registrant. So far as the record shows, no author ever questioned or challenged that practice. *Geisel* v. *Poynter Prod., Inc.*, 295 F. Supp. 331, 160 USPQ 590 (S.D. N.Y. 1968), held that full ownership of copyrightable subject matter may, by custom, be assigned by implication from the author to a publisher. Similarly, *Best Medium Publishing Co.* v. *National Insider, Inc.*, 259 F. Supp. 433–34, 152 USPQ 56–57 (N.D. Ill. 1966), *aff'd*, 385 F. 2d 384, 155 USPQ 550 (7th Cir. 1967), *cert. denied*, 390 U.S. 955, noted:

> "In the absence of evidence to the contrary, the transfer by an author to a magazine publisher of a manuscript without restriction is deemed to carry with it all right, title, and interest, including all rights of copyright, therein."

The fact that authors are not paid by plaintiff for their manuscripts is of little significance. The record shows that medical researchers, on their own volition, submit manuscripts to plaintiff's journals in consideration for the journal's screening and editing, and hopefully accepting and publishing, the manuscripts. Rarely, if ever, do medical researchers publish the results of their work at their own expense. Rather they look to medical journals to bear the

expenses of editing, publishing and disseminating.[6] In the world of academia and its all-too-frequent specter of "publish or perish," researchers compete to get their manuscripts accepted and published by journals of high reputation and wide circulation. Acceptance and publication by a leading journal marks an article as one of importance and good quality. The record shows that over 95 percent of all published medical research appears in medical journal articles. Thus, publication of research work by medical journals, though perhaps not of immediate monetary benefit to researchers, nevertheless enhances, and may even be crucial to, their long-term professional and economic opportunities. The record also shows that, once having succeeded in getting a manuscript accepted and published by plaintiff, authors do not seek publication by others. Rather, they look to plaintiff for reprints, further publication or permission to republish elsewhere. Plaintiff, in turn, grants permission to others, often through royalty-bearing license agreements, to copy, reprint and republish individual journal articles in other forms, *e.g.*, as photocopies, as parts of books or on microfilm. *Cf. Kinelow*, *supra*, and *Brattleboro*, *supra*, wherein the authors did not intend the first publisher to be the sole publisher and, in fact, intended that others republish the work without regard to the first publisher.

In sum, the only reasonable inference (there being no evidence to the contrary) is that the authors assigned to plaintiff, *ab initio* and by implication, the ownership rights to their manuscripts, and did not grant to plaintiff a mere license to publish.

A final point: Implicit in defendant's position on this issue is the notion that it is unfair for plaintiff to derive monetary profit from the work of medical researchers who do not share that profit directly with plaintiff. What defendant overlooks is that with respect to most of plaintiff's journals (and three of the four in suit), profits derived from the journals go in large measure to the medical societies for which the journals are published. The American Gastroen-

[6] Some journals require authors to pay "excess page" charges for unusually long articles and also to pay, at least in part, for certain kinds of illustrations. To this extent, therefore, authors sometimes bear part of the expense of publication. However, there is no evidence that such expenses are substantial (compared to the total cost of publication) or that such requirement discourages authors from submitting manuscripts to plaintiff in favor of publishing them themselves or elsewhere.

terological Association (AGA) and the American Association of Immunologists (AAI) get 50 percent of the profits from *Gastroenterology* and the *Journal of Immunology*, respectively; and the American Society of Pharmacology and Experimental Therapeutics (ASPET) gets 90 percent of the profits from *Pharmacological Reviews*. Most of plaintiff's journals, therefore, operate for the benefit of the medical profession itself, which, in the long run, is for the benefit of the public. In any event, plaintiff's profits are not great, and at best, simply compensate plaintiff for the services it renders as a publisher in a free-enterprise system where income is derived by risking capital to print and disseminate. *E.g.*, in 1968, profit from *Pharmacological Reviews* was $1,154.44 (on sales of about $40,000), of which $1,039 went to ASPET and $115.44 went to plaintiff. In 1969, *Pharmacological Reviews* lost money. Also, in 1969, net income from *Gastroenterology* was $21,312.08 (on sales of about $245,000), and $11,532.35 of that amount was offset by losses the previous year, leaving a balance of $9,779.73. The balance was split between plaintiff and AGA, plaintiff getting $4,889.86.

In short, absent private publishers whose efforts provide for dissemination of 95 percent of the current medical literature, most of the findings of medical research would go unpublished and undisseminated; or at least the burdens of publishing and disseminating would fall upon other organizations, one of which would no doubt have to be the Government.[7]

The real-party-in-interest defense

Defendant says that plaintiff is not the real party in interest with respect to the articles (Counts II to VI) in the *Journal of Immunology* and *Pharmacological Reviews*. Defendant says those journals are owned, respectively, by AAI and ASPET; and, though not expressly urged, it is apparently defendant's position that AAI and ASPET must be joined as parties-plaintiff or else must bring this suit in their own names. The record shows that plaintiff publishes

[7] The UCLA Project, at 956, discusses the problems which would be created if, through failure of private publishers, the Government takes up the slack in medical publishing. Among the problems might be "government influence over the content of writings," implicit in which is the "• • • danger of government censorship • • •. Many scientific journal articles are presently subjected to scrutiny by panels of scientists who determine 'publishability' independently of the editors of journals. Retaining such an evaluative process would allow professional scientists in the author's field, rather than bureaucrats, to decide what is published."

the *Journal of Immunology* under contract with AAI and publishes *Pharmacological Reviews* under contract with ASPET. The contracts obligate plaintiff to secure statutory copyright on the journals in plaintiff's name. While it is true that the contracts provide that the respective societies are the "sole owner of the periodical," the clear intent of the parties is that copyright matters, including acquisition and enforcement, are plaintiff's responsibility. Thus, the ASPET contract provides that it is plaintiff's duty to procure copyright on *Pharmacological Reviews* "in the name of the Publisher" and to oversee and act on requests by others to republish parts thereof, a right incident to the enforcement of copyright. Likewise, the AAI contract requires plaintiff to procure copyright on the *Journal of Immunology* "in the name of the Publisher," and notes that AAI "reserves the right to have the copyright assigned to the Association if at any time in the future this seems desirable." This is a clear indication that it was the parties' intent that plaintiff should own the copyright *ab initio*. In short, there is no evidence that ASPET or AAI intended anything other than that plaintiff, and plaintiff alone, should own the copyright in the respective journals and should enforce the copyright by bringing lawsuits, or otherwise.

In any event, *Dorr-Oliver*, *supra*, disposes of the issue. Plaintiff is, and always has been, the record owner of the copyright registrations and is the proper party to bring suit in this court. *See also Hedeman Prod. Corp.* v. *Tap-Rite Prod. Corp.*, 228 F. Supp. 630, 141 USPQ 381 (D. N.J. 1964).

The noninfringement defense

Defendant contends that its acts of copying do not violate the copyright owner's exclusive right "to copy" the copyrighted work as provided by 17 U.S.C. § 1. The argument is that with respect to books and periodicals, the act of making single copies (*i.e.*, one copy at a time) is not, in itself, sufficient to incur liability; that the "copying," to be actionable, must include "printing" (or "reprinting") and "publishing" of *multiple* copies of the copyrighted work. The argument is bottomed on analysis of the copyright laws as they have evolved from 1790 to the present.[5] The early laws distin-

[5] Congress enacted the first copyright statute in 1790 (Act of May 31, 1790, ch. 15, 1 Stat. 124). Thereafter, the statute was revised from time to time, notably in 1802, 1831, 1870, and 1891. In 1909, the present statute was passed (Act of March 4, 1909, ch. 320, 35 Stat. 1075) and later was codified as 17 U.S.C. (Act of July 30, 1947, 61 Stat. 652).

guished "copying" from "printing," "reprinting," and "publishing," and provided that the copyright in books is infringed by "printing," "reprinting" and "publishing" while the copyright in other works (*e.g.*, photographs, paintings, drawings, etc.) is infringed by "copying." The 1909 Copyright Act obliterated any such distinction. It provides in § 5 a list of all classes of copyrightable subject matter (including books and periodicals), and says in § 1 that the owner of copyright shall have the exclusive right "to print, reprint, publish, copy and vend *the copyrighted work*" [emphasis supplied]. Thus, the 1909 Act, unlike the earlier statutes, does not expressly say which of the proscribed acts of § 1 apply to which classes of copyrightable subject matter of § 5. Defendant says that to be consistent with the intent and purpose of earlier statutes, the "copying" proscription of § 1 should not apply to books or periodicals; rather, only the proscribed acts of "printing," "reprinting" and "publishing" should apply to books and periodicals.

Defendant's argument is not persuasive and, in any event, is irrelevant. It is clear from a study of all the copyright statutes from 1790 to date that what Congress has sought to do in every statute is to proscribe unauthorized *duplication* of copyrighted works. The words used in the various statutes to define infringing acts (*i.e.*, printing, reprinting, copying, etc.) were simply attempts to define the then-current means by which duplication could be effected. It is reasonable to infer that in 1909, when Congress included "copying" in the list of proscribed acts applicable to books and periodicals (as well as copyrightable subject matter in general), it did so in light of the fact that new technologies (*e.g.*, photography) made it possible to duplicate books and periodicals by means other than "printing" and "reprinting." The legislative history of the 1909 Act says little, one way or the other, about the matter.[9] Nevertheless, §§ 1 and 5 are plain and unambiguous on their face; and the Supreme Court held as recently as 1968, in *Fortnightly Corp.*, *supra* note 3, at 394:

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[9] H.R. Rep. No. 2222, 60th Cong., 2d Sess. 4 (1909) states:

> Subsection (a) of section 1 adopts without change the phraseology of section 4952 of the Revised Statutes, and this, with the insertion of the word "copy," practically adopts the phraseology of the first copyright act Congress ever passed—that of 1790. Many amendments of this were suggested, but the committee felt that it was safer to retain without change the old phraseology which has been so often construed by the courts.

> * * * § 1 of the [Copyright] Act enumerates several "rights" that are made "exclusive" to the holder of the copyright. If a person, without authorization from the copyright holder, puts a copyrighted work to a use *within the scope of one of these "exclusive rights," he infringes the copyright.* [Emphasis supplied.]

See also the Register's Report, wherein it is noted at 21–22:

> * * * as several courts have observed, the right embraced in the repetitive terms of section 1(a) is the two-fold right to make and publish copies.
>
> This right is the historic basis of copyright and pertains to *all* categories of copyrighted works. * * * [Emphasis supplied.]

The burden, therefore, is on defendant to show that Congress intended the statute to mean something other than what it plainly says. Defendant has not carried that burden.

It is also pertinent that the courts have liberally construed the 1909 Act to take into account new technologies by which copyrighted works can be duplicated, and thus infringed. In *Fortnightly Corp., supra* note 3, at 395–96, the Court, in dealing with copyright infringement relating to television, said:

> In 1909, radio itself was in its infancy, and television had not been invented. *We read the statutory language of 60 years ago in the light of drastic technological change.* [Emphasis supplied.]

To the same effect is *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. 2d 411 (6th Cir. 1925), *cert. denied*, 269 U.S. 556, which stated at 411:

> * * * the statute may be applied to new situations not anticipated by Congress, if, fairly construed, such situations come within its intent and meaning. Thus it has been held both in this country and England that a photograph was a copy or infringement of a copyrighted engraving under statutes passed before the photographic process had been developed. [citations omitted] While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries.

Furthermore, defendant's argument that it may "copy," short of "printing," "reprinting" and "publishing," is irrelevant under the facts of this case. NLM and the NIH library did not merely "copy" the articles in suit; they, in effect, "reprinted" and "published" them. "Printing" and "reprint-

ing" connote making a duplicate original, whether by printing press or a more modern method of duplication. *Macmillan Co.* v. *King*, 223 F. 862 (D. Mass. 1914); M. NIMMER, COPYRIGHT § 102 (1971 ed.). "Publishing" means disseminating to others, which defendant's libraries clearly did when they distributed photocopies to requesters and users. *Macmillan Co., supra;* M. NIMMER, COPYRIGHT § 104 (1971 ed.).

Defendant's contention that its libraries make only "single copies" of journal articles, rather than multiple copies, is illusory and unrealistic. Admittedly, the libraries, as a general rule, make only one copy per request, usually for different users. But the record shows that the libraries duplicate particular articles over and over again, sometimes even for the same user within a short timespan. *E.g.*, the NIH library photocopied the Count I article three times within a 3-month period, two of the times for the same requester; and it copied the Count IV and Count V articles twice within a 2-month period, albeit for different users. The record also shows that NLM will supply to requesters photocopies of the same article, one after the other, on consecutive days, even with knowledge of such facts. In short, the libraries operate comprehensive duplication systems which provide every year thousands of photocopies of articles, many of which are copies of the same article; and, in essence, the systems are a reprint service which supplants the need for journal subscriptions. The effects of this so-called "single copying" practice on plaintiff's legitimate interests as copyright owner are obvious. The Sophar and Heilprin report, at 16, puts it in terms of a colorful analogy: "Babies are still born one at a time, but the world is rapidly being overpopulated."

Finally, and in any event, there is nothing in the copyright statute or the case law to distinguish, in principle, the making of a single copy of a copyrighted work from the making of multiple copies. The first copyright statute (Act of 1790) provided in § 2 that it was infringement to make "any *copy* or *copies*" [emphasis supplied] of a copyrighted work. Nothing in the later statutes or their legislative histories suggests that Congress intended to change that concept. And the courts have held that duplication of a copyrighted work, even to make a single copy, can constitute infringement. *White-Smith Music Co.* v. *Apollo Co.*, 209 U.S. 1, 16–17 (1908); *Patterson* v. *Century Productions, Inc.*, 93 F. 2d 489, 493, 35 USPQ 471, 475 (2d Cir. 1937), *cert. denied*, 303 U.S. 655

(1938); *Greenbie* v. *Noble*, 151 F. Supp. 45, 63, 113 USPQ 115, 128 (S.D. N.Y. 1957).

The "fair use" defense

Defendant contends that its copying comes under the doctrine of "fair use" of copyrighted works. "Fair use," a judicially-created doctrine, is a sort of "rule of reason" applied by the courts as a defense to copyright infringement when the accused infringing acts are deemed to be outside the legitimate scope of protection afforded copyright owners under 17 U.S.C. § 1. What constitutes "fair use" cannot be defined with precision. Much has been written about the doctrine, particularly its rationale and scope. *See, e.g.*, A. Latman, Fair Use of Copyrighted Works, Study No. 14, Copyright Law Revision, Studies Prepared for Senate Comm. on the Judiciary, 86th Cong., 2d Sess. (1960); Comment, *Copyright Fair Use—Case Law and Legislation*, 1969 Duke L.J. 73; S. Cohen, Fair Use and the Law of Copyright, ASCAP Copyright Law Symposium (No. 6) 43 (1955); W. Jensen, *Fair Use: As Viewed by the "User,"* 39 Dicta 25 (1962); L. Yankwich, *What Is Fair Use?*, 22 U. Chi. L. Rev. 203 (1954); Note, *Fair Use: A Controversial Topic in the Latest Revision of Our Copyright Law*, 34 U. Cin. L. Rev. 73 (1965); M. Nimmer, Copyright § 145 (1971 ed.); Sophar & Heilprin Report at 15; R. Heedham, Tape Recording, Photocopying and Fair Use, ASCAP Copyright Law Symposium (No. 10) 75 (1959); Crossland, *The Rise and Fall of Fair Use: The Protection of Literary Materials Against Copyright Infringement by New and Developing Media*, 20 S. Car. L. Rev. (1968). Some courts have held that the doctrine is but an application of the principle *de minimis non curat lex* and, as plaintiff puts it, "comes into play only when a relatively small amount of copying takes place." Principal factors considered by the courts in deciding whether a particular use of a copyrighted work is a "fair use" are (a) the purpose of the use, (b) the nature of the copyrighted work, (c) the amount and substantiality of the material used in relation to the copyrighted work as a whole, and (d) the effect of the use on a copyright owner's potential market for his work.[10] While these criteria are interrelated and may

[10] H.R. Rep. No. 83, 90th Cong., 1st Sess. (1967), which relates to revision of the copyright laws, notes that these factors are the ones used by the courts. At 29-37, there is a detailed discussion of "fair use" as applicable to photocopying for educational purposes.

vary in relative significance, the last one, *i.e.*, the competitive character of the use, is often the most important. *E.g.*, it has been held "fair use" to copy excerpts from literary works for purposes of criticism or review (*Loew's, Inc.* v. *CBS, Inc.*, 131 F. Supp. 165, 105 USPQ 302 (S.D. Cal. 1955), *aff'd sub nom. Benny* v. *Loew's, Inc.*, 239 F. 2d 532, 112 USPQ 11 (9th Cir. 1956), *aff'd by an equally divided Court*, 356 U.S. 43 (1958)); or to copy portions of scholarly works (*Greenbie* v. *Noble, supra; Holdredge* v. *Knight Publishing Corp.*, 214 F. Supp. 921, 136 USPQ 615 (S.D. Cal. 1963)). However, it is not "fair use" to copy substantial portions of a copyrighted work when the new work is a substitute for, and diminishes the potential market for, the original. *Hill* v. *Whalen & Martell, Inc.*, 220 F. 359 (S.D.N.Y. 1914); *Folsom* v. *Marsh*, 9 F. Cas. 343 (D. Mass. 1841). And it has been held that wholesale copying of a copyrighted work is never "fair use" (*Leon* v. *Pacific Tel. & Tel. Co.*, 91 F. 2d 484, 34 USPQ 237 (9th Cir. 1937); *Public Affairs Associates, Inc.* v. *Rickover*, 284 F. 2d 262, 127 USPQ 231 (D.C. Cir. 1960), *vacated and remanded*, 369 U.S. 111 (1962)), even if done to further educational or artistic goals and without intent to make profit. *Wihtol* v. *Crow*, 309 F. 2d 777, 135 USPQ 385 (8th Cir. 1962).

Whatever may be the bounds of "fair use" as defined and applied by the courts, defendant is clearly outside those bounds. Defendant's photocopying is wholesale copying and meets none of the criteria for "fair use." The photocopies are exact duplicates of the original articles; are intended to be substitutes for, and serve the same purpose as, the original articles; and serve to diminish plaintiff's potential market for the original articles since the photocopies are made at the request of, and for the benefit of, the very persons who constitute plaintiff's market. Defendant says, nevertheless, that plaintiff has failed to show that it has been harmed by unauthorized photocopying; and that, in fact, plaintiff's journal subscriptions have increased steadily over the last decade. Plaintiff need not prove actual damages to make out its case for infringement. *Macmillan Co., supra.* Section 1498 of title 28 U.S.C. provides for payment of "reasonable and entire compensation * * * including minimum statutory damages as set forth in section 101(b) of title 17, United States Code." *See Brady* v. *Daly*, 175 U.S. 148 (1899); *F. W.*

Woolworth & Co. v. *Contemporary Arts, Inc.*, 344 U.S. 228 (1952). M. NIMMER, COPYRIGHT § 154 (1971 ed.). Moreover, damage may be inferred in this case from the fact that the photocopies are intended to supplant the original articles. While it may be difficult (if not impossible) to determine the number of subscription sales lost to photocopying, the fact remains that each photocopy user is a potential subscriber, or at least is a potential source of royalty income for licensed copying. Plaintiff has set up a licensing program to collect royalties for photocopying articles from its journals; and among the licensees have been libraries, including a Government library.[11] Also, there is evidence that one subscriber canceled a subscription to one of plaintiff's journals because the subscriber believed the cost of photocopying the journal had become less than the journal's annual subscription price; and another subscriber canceled a subscription, at least in part because library photocopies were available. Loss of subscription (or photocopying royalty) income is particularly acute in the medical journal field. The record shows that printing preparation costs are 50–65 percent of total cost of publication and that the number of subscriptions is relatively small. This simply means that any loss of subscription sales (or royalty income) has the effect of spreading publication costs over fewer copies, thus driving up steeply the unit cost per copy and, in turn, subscription prices. Higher subscription prices, coupled with cheap photocopying, means probable loss of subscribers, thus perpetuating a vicious cycle which can only bode ill for medical publishing.

Defendant's amici fear that a decision for plaintiff will be precedent for plaintiff's seeking injunctions against non-Government libraries, pursuant to 17 U.S.C. § 101(a), thereby interfering with the free flow of technical and scientific information through library photocopying. On the basis of this record and representations made by plaintiff's personnel and counsel, that fear does not appear to be justified. Plain-

[11] There is no agreement, even among libraries and Government agencies, of what constitutes "fair use" in institutionalized photocopying. The Library of Congress will not photocopy copyrighted materials without permission of the copyright owners. Many other libraries follow the General Interlibrary Loan Code and engage in "single copy" photocopying. The U.S. Office of Education, through its Education Resources Information Center (ERIC) makes available current educational and research-related materials. ERIC will not copy copyrighted materials without permission of the copyright owner. See Sophar and Heilpria report at 39–46.

tiff does not seek to *enjoin* any photocopying of its journals. Rather, it merely seeks a reasonable royalty therefor.[12] Its licensing program would so indicate for, as far as the record shows, plaintiff will grant licenses to anyone at a reasonable royalty. No doubt, plaintiff would prefer that all of its journal users be subscribers. However, plaintiff recognizes that this is unrealistic. Some articles in its journals are in greater demand than others, and many journal users will not consider it economically justifiable to subscribe to a journal simply to get access to a few articles. Implicit in plaintiff's licensing program, therefore, is the idea that it is in the best interest of all concerned that photocopying proceed without injunction, but with payment of a reasonable fee. That would appear to be a logical and commonsense solution to the problem, not unlike the solution provided by the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) in the field of music and the performing arts. For a description of how ASCAP and BMI operate in a context similar to this one, see *Hearings on H.R. 4347 and other bills before Subcomm. No. 3, House Comm. on the Judiciary*, 84th Cong., 1st Sess. 194, 203 (1965); Finkelstein, ASCAP *as an Example of the Clearing House System in Operation*, 14 COPYRIGHT SOC'Y BULL. 2 (1966).

Defendant says that photocopying by NLM and the NIH library is "reasonable and customary" because it complies with a longstanding practice of libraries to supply photocopies of parts of scientific works to persons engaged in scholarly research, and is consistent with the terms of the "gentlemen's agreement," earlier noted. The "gentlemen's agreement," drafted in 1935, was the product of meetings and discussions between representatives of the book publishing industry and libraries. The representatives were interested in working out a practical accommodation of the conflict

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[12] In his opening statement at trial, plaintiff's counsel said (emphasis supplied):

> The case has nothing to do with the stopping of photocopying. The Commissioner knows that an injunction is not available in this court, *nor is plaintiff, in any case, seeking to curtail this use of its articles.*

Similarly, William M. Passano, plaintiff's Chairman of the Board, stated in a hearing before a Senate committee:

> We feel that it is unrealistic and not in the public interest to consider restricting in any way the use of photocopying devices. They serve a useful purpose in the dissemination of knowledge. Since we, as publishers, are in that business, we certainly don't want to see the spread of knowledge curtailed.
>
> To us the only solution to the problem is a simple system of royalty payments with a minimum of red tape. * * * [Hearings on Copyright Law Revison before the Patents, Trademarks and Copyrights Subcomm. of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 976 (1967).]

between (a) the legitimate interests of copyright owners not to have their works copied without compensation and (b) the needs of scholars and research workers for copies of parts of copyrighted works for private use in pursuit of literary or scientific investigation. The "agreement" was, in effect, a promise by the book publishers not to interfere with library photocopying under three conditions: (i) the library must warn the person for whom the photocopy is made that he is liable for any copyright infringement by misuse (presumably by making further photocopies), (ii) the photocopying must be done without profit to the library, and (iii) the amount copied must not be so substantial as to constitute an infringement. The third condition is implicit in the "agreement" which says:

> While the right of quotation without permission is not provided in law, the courts have recognized the right to a "fair use" of book quotations, the length of a "fair" quotation being dependent upon the type of work quoted from and the "fairness" to the author's interest. *Extensive quotation is obviously inimical to the author's interest.* * * * *It would not be fair to the author or publisher to make possible the substitution of the photostats for the purchase of a copy of the book itself either for an individual library or for any permanent collection in a public or research library. Orders for photocopying which, by reason of their extensiveness or for any other reasons, violate this principle should not be accepted.* [Emphasis supplied.]

The "gentlemen's agreement" does not have, nor has it ever had, the force of law with respect to what constitutes copyright infringement or "fair use." So far as this record shows, the "agreement" has never been involved in any judicial proceedings. Nevertheless, the "agreement" is entitled to consideration as a guide to what book publishers and libraries considered to be "reasonable and customary" photocopying practices in the year 1935. It has little significance, however, to this case. The agreement was drafted on behalf of a book publishers' organization which is now defunct and to which plaintiff never belonged. In fact, it appears that no periodical publishers were represented in the organization at the time the agreement was drafted; and, consequently, the "agreement" cannot speak for their interests or problems. See the Varmer study at 51, n. 9. Furthermore, the "agreement" was drafted at a time when photocopying was rela-

tively expensive and cumbersome; was used relatively little as a means of duplication and dissemination; and posed no substantial threat to the potential market for copyrighted works. Beginning about 1960, photocopying changed character. The introduction to the marketplace of the office copying machine made photocopying rapid, cheap and readily available. The legitimate interests of copyright owners must, accordingly, be measured against the changed realities of technology. Professor Nimmer in his treatise COPYRIGHT capsules the point at 653:

> Both classroom and library reproduction of copyrighted materials command a certain sympathy since they involve no commercial exploitation and more particularly in view of their socially useful objectives. *What this overlooks is the tremendous reduction in the value of copyrighted works which must result from a consistent and pervasive application of this practice.* One who creates a work for educational purposes may not suffer greatly by an occasional unauthorized reproduction. But if every school room or library may, by purchasing a single copy, supply a demand for numerous copies through photocopying, mimeographing or similar devices, the market for copyrighted educational materials would be almost completely obliterated. This could well discourage authors from creating works of a scientific or educational nature. If the 'progress of science and useful arts' is promoted by granting copyright protection to authors, such progress may well be impeded if copyright protection is largely undercut in the name of fair use. [Emphasis supplied.]

In any event, the "gentlemen's agreement" by its own terms condemned as "not * * * fair" the making of photocopies which could serve in "substitution" for the original work, and further noted that "[o]rders for photo-copying which, by reason of their extensiveness or for any other reasons" could serve as duplicates of the original copyrighted work "should not be accepted." Thus, the most that can be said for the "gentlemen's agreement" is that it supported (and probably still supports) the proposition that it is "reasonable and customary" (and thus "fair use") for a library to photocopy for a patron a part of a book, or even part of a periodical article, such as a chart, graph, table, or the like, so long as the portion copied is not practically a substitute for the entire original work. Other instances of library photocopying may also be "fair use." *E.g.*, a library no doubt can replace dam-

aged pages of copyrighted works in its collection with photocopies; can make a small number of photocopies for in-house administrative purposes, such as cutting up for cataloging or the like; or can supply attorneys or courts with single photocopies for use in litigation. In all those instances, and probably many more which might come to mind on reflection, the rights of the copyright owner are not materially harmed. The doctrine of "fair use" and the "gentlemen's agreement," however, cannot support wholesale copying of the kind here in suit.[13]

Defendant also contends that traditionally, scholars have made handwritten copies of copyrighted works for use in research or other scholarly pursuits; that it is in the public interest that they do so because any harm to copyright owners is minimal compared to the public benefits derived therefrom; and that the photocopying here in suit is essentially a substitute for handcopying by the scholars themselves. That argument is not persuasive. In the first place, defendant concedes that its libraries photocopy substantially more material than scholars can or do copy by hand. Implicit in such concession is a recognition that laborious handcopying and rapid machine photocopying are totally different in their impact on the interests of copyright owners. Furthermore, there is no case law to support defendant's proposition that the making of a handcopy by scholars or researchers of an *entire* copyrighted work is permitted by the copyright laws. Certainly the statute does not expressly permit it; and no doubt the issue has never been litigated because, as a practical matter, such copying is *de minimis* and causes no real threat to the copyright owner's legitimate right to control duplication and dissemination of copyrighted works. The photocopying done by NLM and the NIH library, on the other hand, poses a real and substantial threat to copyright owners' legitimate interests. Professor Nimmer discusses the point succinctly, at 653–54 of his treatise, and his language can hardly be improved upon:

> It may be argued that library reproduction is merely a more modern and efficient version of the time-honored practice of scholars in making handwritten copies of

[13] The potential pernicious effects of modern, institutionalized photocopying of copyrighted works (particularly journal articles) in the name of "fair use" is discussed at length in the Sophar and Heilprin report. The authors, at 24, characterize wholesale copying by libraries as "a non-violent form of civil disobedience."

copyrighted works, for their own private use. In evaluating this argument several factors must be considered. In the first place, the drudgery of making handwritten copies probably means that such copies in most instances are not of the complete work, and the quantitative insignificance of the selected passages are such as generally not to amount to a *substantial* similarity. Secondly, there would appear to be a qualitative difference between each individual scholar performing the task of reproduction for himself, and a library or other institution performing the task on a wholesale basis for all scholars. If the latter is fair use, then must not the same be said for a non-profit publishing house that distributes to scholars unauthorized copies of scientific and educational works on a national or international basis? Finally, it is by no means clear that the underlying premise of the above argument is valid.

There is no reported case on the question of whether a single handwritten copy of all or substantially all of a protected work made for the copier's own private use is an infringement or fair use. If such a case were to arise the force of custom might impel a court to rule for the defendant on the ground of fair use. Such a result, however, could not be reconciled with the rationale for fair use suggested above since the handwritten copy would serve the same function as the protected work, and would tend to reduce the exploitation value of such work. Moreover, if such conduct is defensible then is it not equally a fair use for the copier to use his own photocopying or other duplicating device to achieve the same result? Once this is acknowledged to be fair use, the day may not be far off when no one need purchase books since by merely borrowing a copy from a library any individual will be able to make his own copy through photocopying or other reproduction devices which technological advances may soon make easily and economically available.

To the same effect is a statement in the Varmer study at 62–63:

It has long been a matter of common practice for individual scholars to make manual transcriptions of published material, though copyrighted, for their own private use, and this practice has not been challenged. Such transcription imposed its own quantitative limitations; and in the nature of the event, it would not be feasible for copyright owners to control private copying and use. But reproduction for private use takes on different dimensions when made by modern photocopying devices capable of reproducing quickly any volume of material in any number of copies, and when

> copies are so made to be supplied to other persons. Publisher's copies are bought for the private use of the buyer, and in some circumstances a person supplying copies to others will be competing with the publisher and diminishing his market.
>
> Not only is such competition unfair to the publisher and copyright owner, but it may be injurious to scholarship and research. Thus, it has been pointed out that widespread photocopying of technical journals might so diminish the volume of subscriptions for the journals as to force the suspension of their publication.

Also, the Register's Report notes at 25–26:

> Researchers need to have available, for reference and study, the growing mass of published material in their particular fields. This is true especially, though not solely, of material published in scientific, technical, and scholarly journals. Researchers must rely on libraries for much of this material. When a published copy in a library's collections is not available for loan, which is very often the case, the researcher's need can be met by a photocopy.
>
> On the other hand, the supplying of photocopies of any work to a substantial number of researchers may diminish the copyright owner's market for the work. Publishers of scientific, technical, and scholarly works have pointed out that their market is small; and they have expressed the fear that if many of their potential subscribers or purchasers were furnished with photocopies, they might be forced to discontinue publication.

Finally, defendant says that it is unconstitutional to construe the copyright law so as to proscribe library photocopying of scientific or technical writings because such photocopying is consonant with the constitutional purpose of copyright "to promote the progress of science." That argument misses the mark. Article I, section 8, clause 8, of the U.S. Constitution grants to Congress the "Power * * * To Promote the Progress of Science * * * by securing for limited Times to Authors * * * the exclusive Right to their * * * Writings * * *." The word "Science" is used in the sense of general knowledge rather than the modern sense of physical or biological science. *See* Rich, *Principles of Patentability*, 28 GEO. WASH. L. REV. 393, 394–97 (1960); H.R. REP. No. 1923, 82d Cong., 2d Sess. 4 (1952); S. REP. No. 1979, 82d Cong., 2d Sess. 3 (1952). Congress has exercised its constitutional power by enacting, and revising from time to time, copyright statutes which are the method of, and provide a *system* for, achieving the constitu-

tional purpose. The system "promotes progress" by encouraging authors to write and publicly disclose their writings; by inducing publishers and entrepreneurs to invest risk capital in the dissemination of authors' writings; and by requiring other authors to create new writings, rather than plagiarize the old, all of which is in the public interest. *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954), *rehearing denied*, 347 U.S. 949. Congress has broad discretion under the Constitution to prescribe the conditions under which copyright will be granted, the only express restriction being that any "exclusive right" must be for a "limited time." Nothing in the present statute, its legislative history or the case law suggests that Congress intended to exempt libraries or others from liability for wholesale copying of copyrighted works, whatever be the purpose or motivation for the copying. What defendant really appears to be arguing is that the copyright law *should* excuse libraries from liability for the kind of photocopying here in suit. That, of course, is a matter for Congress, not the courts, to consider for it involves questions of public policy aptly suited to the legislative process. In an analogous context in *Fortnightly Corp., supra*, Justice Fortas noted at 408:

> The task of caring for CATV is one for the Congress. Our ax, being a rule of law, must cut straight, sharp, and deep; and perhaps this is a situation that calls for the compromise of theory and for the architectural improvisation which only legislation can accomplish.

See also White-Smith Music Co., supra, where the Court noted at 18, that "considerations [of what the copyright laws should provide] properly address themselves to the legislative and not the judicial branch of the Government." [14]

The license defense

Defendant says it is licensed to copy the Count I, IV, V, and VI articles—by express license with respect to the Count I article and by implied license with respect to the Count IV, V and VI articles. The articles state on their faces that the research work therein reported was supported, at least in

[14] There has been no dearth of activity to revise the 1909 Copyright Act. Some of that activity relates to library photocopying problems. See, e.g., Hearings on H.R. 4347 and other bills before Subcomm. No. 3, House Comm. on the Judiciary, 84th Cong., 1st Sess. 448, 459, 1133 (1965); S. 597, H.R. 2512, 90th Cong., 1st Sess. (1967); S. 543, 91st Cong., 1st Sess. (1969); S. Rep. No. 91-1219, 91st Cong., 2d Sess. 5 (1970); S. 644, 92d Cong., 1st Sess. (1971). For a brief history of legislative activity directed toward revision of the 1909 Copyright Act, *see Fortnightly Corp., supra* at 396 n. 17; UCLA Project at 931-38.

part, by grants from defendant's Public Health Service. By way of background, the Public Health Service, through its Division of Research Grants, has for many years made grants-in-aid of public funds to physicians and scientists engaged in medical research. The grants are characterized by the Public Health Service as "conditional gifts" and are made annually on the basis of research proposals submitted to the Public Health Service by prospective grantees. Once a grant is made, the grantee is free to use the funds as he sees fit. The grantees are not Government employees nor are they in the service of the United States, and the Public Health Service does not supervise the research work. Typically, grantees use the funds to purchase equipment and supplies, pay salaries of technicians, pay travel expenses, and the like. From time to time, the Division of Research Grants issues policy statements setting out the conditions of the grants, including the rights and responsibilities of grantees with respect to patent and copyright matters. All grants are awarded subject to the express patent and copyright policy in effect at the time of the grant, unless the Public Health Service indicates otherwise.

Prior to July 1, 1965, it was the express policy of the Public Health Service not to reserve to the Government any rights in copyrighted publications stemming from grant-funded research. The policy statement in effect between 1956 and 1959 said that when a grant was made "without condition," any "books or related matter" could be "published privately" and the author was free to make arrangements with a publisher "*as if the Government had not contributed support.*" [Emphasis supplied.] Subsequent policy statements, issued in 1959 and 1963, though worded differently, were to the same effect and continued the earlier policy. Then, on July 1, 1965, the policy was modified. For all grants awarded after that date, the Government reserved a royalty-free license to "reproduce * * * translate * * * publish * * *, use and dispose of" any copyrighted publications resulting from "work supported by the Public Health Service." Grantees were still free, however, to arrange for publication and copyright, in the first instance, without approval of the Public Health Service.

The Count I article was coauthored by Dr. Victor A. McKusick who for many years received Public Health Service

funds to support his research. The article reports the results of research work supported in part by such funds and in part by private funds. The manuscript for the article was submitted to the editor of *Medicine* on August 19, 1964, but was not published until December 9, 1965. Between those dates, the manuscript was edited and augmented from time to time. Defendant contends that the article reports research work done under Public Health Service funds awarded after July 1, 1965; and that consequently, the Government has an express license to copy the article pursuant to the Public Health Service's post-July 1, 1965 copyright policy.

The record does not support defendant. The evidence shows that between August 19, 1964 and mid-1965, the authors made minor changes in the manuscript to reflect continuing research on the project reported in the manuscript. However, after mid-1965 (*i.e.*, July 1, 1965), no substantive changes were made in the manuscript. Any changes made were, at most, editorial in nature. Accordingly, defendant has failed to show that the Count I article reports research work done with Government funds granted after July 1, 1965; and the Government does not have an express license to copy the article.

There remains to decide whether the Government is impliedly licensed to copy the Count IV, V and VI articles,[18] published in the *Journal of Immunology* in August 1965. The manuscripts were received by the publisher in December 1964. Defendant does not contend that the articles report research work done under funds awarded by the Public Health Service after July 1, 1965, and therefore does not contend that the Government has an express license to copy. Rather, defendant says that it has an implied license to copy because the Government provided "substantial funds * * * to the authors of the articles to support the very research work reported in these articles," and that a license to copy should be implied on "general equitable principles to avoid injustice."

In another but analogous context, this court has held that when the Government provides funds to contractors for research and development, it is entitled to a license to use any inventions resulting therefrom, even in the absence of an express patent license clause in the contract. *Ordnance*

[18] Though not urged by defendant, its arguments for implied license apply equally to the Count I article.

Eng'r Corp. v. *United States*, 68 Ct. Cl. 301, 353 (1929); *Mine Safety Appliances Co.* v. *United States*, 176 Ct. Cl. 777, 789, 364 F. 2d 385, 392, 150 USPQ 453, 459 (1966). This court has also held that it will liberally construe patent license clauses in Government research and development contracts so as to grant to the Government licenses to use inventions developed thereunder. *AMP Inc.* v. *United States*, 182 Ct. Cl. 86, 389 F. 2d 448, 156 USPQ 647 (1968), *cert. denied*, 391 U.S. 964. However, an implied license to use patented inventions will not be found when a contract contains express language to the contrary. *Eastern Rotorcraft Corp.* v. *United States*, 181 Ct. Cl. 299, 384 F. 2d 429, 155 USPQ 729 (1967). Similarly, if the Government has an established policy limiting its rights in proprietary property, that policy will not be overridden retroactively, even on equitable grounds. *Tektronix, Inc.* v. *United States*, 173 Ct. Cl. 281, 351 F. 2d 630, 147 USPQ 216 (1965).

This case, of course, is fundamentally different from patent license cases because the Public Health Service grants, being "conditional gifts," are not contracts in the same sense as Government supply contracts or research and development contracts. Nevertheless, the rationale applicable to patent license cases would appear sound here because the grants are made subject to compliance by grantees with express conditions and policies of the Government, through the Public Health Service. Viewed in that light, defendant cannot prevail. The Public Health Service had an established and express policy, prior to July 1, 1965, under which it reserved neither title to, nor any rights whatsoever in, publications stemming from Public Health Service grants. Copyright matters were to be dealt with "as if the Government had not contributed support." It is hard to conceive of language which more plainly disclaims any reservation of rights to the Government. After July 1, 1965, the Public Health Service expressly changed its policy; and no doubt the Government is licensed to copy, without royalty, publications stemming from awards granted thereafter. In sum, defendant has neither an express nor implied license to copy the Count I, IV, V, and VI articles.

It is pertinent to note that resolution of this issue in plaintiff's favor should be of minor practical consequence to the Government's future copying of articles stemming from Pub-

lic Health Service-funded research. The Sophar and Heilprin report found that 85 percent of the material photocopied by U.S. libraries is less than 5 years old, and 90 percent is less than 10 years old. Since the Public Health Service's express license policy is nearly 7 years old, most of the Government's prospective copying (as well as its copying for the past year or so) of articles stemming from grant-funded research, will be of articles which resulted from grants awarded subsequent to July 1, 1965, and will therefore be royalty-free.

III

Several other points raised by the parties merit comment. Defendant notes that the National Library of Medicine Act by which NLM was created (42 U.S.C. § 275, *et seq.*) provides at § 276(4) that the Secretary of Health, Education, and Welfare, through NLM, shall "make available, through loans, photographic or other copying procedures or otherwise, such materials in the Library as he deems appropriate * * *"; and that the Medical Library Assistance Act of 1965 (42 U.S.C. § 280b–1, *et seq.*) provides that grants be made to medical libraries for, among other things, "acquisition of duplicating devices, facsimile equipment * * * and other equipment to facilitate the use of the resources of the library." 42 U.S.C. 280b–7. Defendant suggests that by those statutory provisions Congress intended to exempt NLM and other grantee libraries from the copyright laws. As defendant puts it, "* * * the only reasonable interpretation [of the statutes] is that Congress knew that fair use would exempt such libraries from copyright infringement in the established use by libraries of such [photocopy] equipment." There is no merit to this. Nothing in the statutes or their legislative histories says anything about the copyright laws, and it cannot be inferred that Congress intended the statutes to be in derogation of the copyright laws, absent an express indication to the contrary.[16] *See generally*, E. CRAWFORD, STATUTORY CONSTRUCTION § 227 (1940). No court has ever held that "fair use" applies to library wholesale photocopying; nor has there been a uniform and unchallenged policy among libraries and other institutionalized photocopiers on the bounds of "fair

[16] H.R. Rep. No. 941, 84th Cong., 2d Sess. (1956); S. Rep. No. 2071, 84th Cong., 2d Sess. (1956); H.R. Rep. No. 1026, 89th Cong., 1st Sess. (1965); S. Rep. No. 756, 89th Cong., 1st Sess. (1965).

use." See note 11. Thus, it makes no sense to impute to Congress an intent for which there is no sound basis in judicial decision, or otherwise. The fact that the statutes authorize the libraries to make use, generally, of photocopying equipment and procedures, is not controlling or even very significant. Much material in library collections is either not copyrighted or is material on which the copyright has expired; and in either event, the material is in the public domain and can be freely copied.

Furthermore, the record shows that NLM, from the beginning, has been concerned about complying with the copyright laws and has never considered itself exempt therefrom. In 1957, NLM's Board of Regents discussed the library's photocopying practices and deemed them to create vexing copyright infringement problems. The Director of NLM was of the opinion that "sooner or later" the problems would bring "a test of the issue in the courts."

Defendant suggested at trial that payment of compensation to plaintiff for photocopying its journals would create a continuing undue and oppressive administrative and financial burden on NLM and the NIH library. Defendant has not pressed the point in its brief, perhaps because it is clear that plaintiff's right to compensation under 28 U.S.C. § 1498(b) cannot depend on the burdens of compliance. Nevertheless, defendant's point merits comment since courts should be mindful of the practical consequences of their decisions. Based on this record, defendant's fears are not justified. Both NLM and the NIH library already have administrative procedures by which they keep detailed records of photocopying. Both libraries require that written request slips be submitted by requesters of photocopies. The slips are a permanent record of the journals and pages photocopied. It would seem a routine, albeit tedious, matter to cull from those records the information necessary to calculate a reasonable royalty on the basis of the number of articles copied, or perhaps to come up with an acceptable formula for establishing a blanket annual royalty payment. Indeed, the evidence suggests that this is so. In 1967, NLM temporarily stopped photocopying articles from plaintiff's journals, as a result of plaintiff's charge of copyright infringement and requests for a reasonable royalty. NLM was able, as a practical matter, to flag all requests for photocopies from plaintiff's

journals from April 27, 1967 to May 29, 1967, in order to refrain from copying them. On about May 29, 1967, photocopying was resumed and was monitored for about 90 days. Satisfied that the 90-day period was a representative sample, NLM found that it would have paid plaintiff about $250–$300 if it had acceded to plaintiff's request for royalty payment. The Director of NLM testified that, in his opinion, this was "a very small sum—surprisingly small sum." Similarly, the NIH librarian testified that payment of royalties for photocopying "has nothing to do with the operation of the library in the fulfillment of * * * [its] function. It is an economic and budgetary consideration and not a service-oriented kind of thing."

Nor does it appear that payment of royalties to other publishers will create an undue or oppressive administrative burden. The Sophar and Heilprin report notes, at 58–60, that based on a study of the photocopying practices of U.S. libraries, less than 1,000 publishers provide the material photocopied by libraries, and that about 5 percent of that number provide about 40 percent of the material copied. This simply means that nearly half of the materials photocopied emanate from about 50 publishers. No doubt, the materials photocopied by NLM and the NIH library come from an even smaller number of publishers since those libraries are highly specialized. In any event, by using modern management practices including computers and the like, it would appear that NLM and the NIH library can, with minimum disruption, cope with the necessary recordkeeping.[17]

[17] It has been suggested that there be established a clearinghouse for access, permissions and payments for photocopying of copyrighted materials. The clearinghouse would relieve institutional copiers of the burdens of royalty distribution and might also be instrumental in setting up blanket royalty arrangements, thus relieving the institutions from most recordkeeping requirements. See, e.g., the Sophar and Heilprin report at 82. The clearinghouse concept has also been alluded to in a congressional report:

> * * * Despite past efforts, reasonable arrangements involving a mutual understanding of what generally constitutes acceptable library practices, *and providing workable clearance and licensing conditions*, have not been achieved and are overdue. The committee urges all concerned to resume their efforts to reach an accommodation under which the needs of scholarship and the rights of authors would both be respected. [Emphasis supplied.] [H.R. Rep. No. 83, 90th Cong., 1st Sess. 36 (1967).]

And it is interesting that Sophar and Heilprin found that librarians favored, two to one, the clearinghouse approach to the problem, even though many of those in favor "indicated a desire to settle an increasingly complex matter, rather than an enthusiastic approval of the idea." Sophar and Heilprin report, at p. v of the Summary.

Postscript: The issues raised by this case are but part of a larger problem which continues to plague our institutions with ever-increasing complexity—how best to reconcile, on the one hand, the rights of authors and publishers under the copyright laws with, on the other hand, the technological improvements in copying techniques and the legitimate public need for rapid dissemination of scientific and technical literature. The conflict is real; the solution not simple. Legislative guidelines seem appropriate.[18] The Sophar and Heilprin report, at pp. VIII–IX of the Summary, capsules the problem in a statement worth quoting:

> From the viewpoint of the information scientist, copyright may appear as an impediment to the most efficient flow of information. It is apparently a blockage in an information system. Our early tendency was to oppose and try to limit the protection and control granted in copyright for the sake of efficiency. After careful analysis we no longer do.
>
> There is a philosophical reason for not wanting to see copyright destroyed and there are a number of practical reasons. The philosophical reason is simply a belief that copyright is one of a number of ways in which our society expresses its belief and hope that an individual can continue his identity in a world of mass efforts by assuring the individual, his publisher or his association sufficient income from his ideas to maintain a degree of independence. The erosion of the economic value of copyright must lead to federal support of all kinds of writing and, of course, control.
>
> The practical reasons flow from the philosophical reasons. Publishers, non-profit as well as commercial, will simply not be able to continue publishing under an eroded system. The scientific and other professional societies which, through their memberships, have done the most to develop information-handling tools and media are the ones most hurt by them. A means must be developed to assure payment to the copyright owner in return for

[18] In 1969, several bills were introduced in both the Senate and House to establish a National Commission on Libraries and Information Science. Also in 1969, H.R. 8809 was introduced to provide for a "National Science Research Data Processing and Information Retrieval System." See 1969 Register of Copyrights Annual Rep. 6. Earlier, in 1967, the Senate enacted S. 2216, 90th Cong., 1st Sess., by which there would be created a commission to study and compile data on the reproduction and use of copyrighted works. The House took no action on the bill.

unlimited and uncontrolled access to and duplication of the copyrighted work.

Our only concern and "vested interest" in copyright since we became interested in the problem "is to find a way to protect the 'exclusive Right' of an author to his 'Writings,' while permitting the advantages of modern information dissemination systems to become as useful as they may without weakening or threatening the economic urge and the need to create." We believe the two must become reconciled, not in the interests of compromise, but simply because both concepts are too valuable for either one to be permitted to severely harm or destroy the other.

Findings of Fact

1. This is a copyright suit under 28 U.S.C. § 1498(b). Plaintiff seeks reasonable and entire compensation for alleged infringement by the United States of certain copyrights in medical journals.

2. Plaintiff, The Williams & Wilkins Company, is a publisher located in Baltimore, Maryland. Though a relatively small company, plaintiff is one of the major publishers of medical journals in the United States. Plaintiff also publishes medical books. Plaintiff is a family-owned corporation, and its principal officers are William M. Passano and Charles O. Reville.

3. The Government agency accused of infringement is the Department of Health, Education, and Welfare, in particular the National Institutes of Health (NIH) and the National Library of Medicine (NLM). NIH and NLM are located in Bethesda, Maryland.

4. The petition was filed in this court on February 27, 1968, and was amended on July 23, 1970. The petition alleged infringement by reason of the Government's unauthorized photocopying of seven journal articles, identified below as Counts I to VII. The amended petition alleged infringement by reason of the Government's unauthorized photocopying of one journal article, identified below as Count VIII. The articles, and the journals in which they were published, are as follows:

Count	Article	Authors	Journal	Vol.	Issue	Pages	Month	Year
I.	The Genetic Mucopolysaccharidoses	Victor A. McKusick, David Kaplan, David Wise, W. Brian Hanley, S. B. Suddarth, M. E. Sevick, A. Edward Maumanee.	*Medicine*	44	6	445-483	Nov.	1965
II.	Supersensitivity and Subsensitivity to Sympathomimetic Amines.	Ullrich Trendelenburg	*Pharmacological Reviews*	15	2	225-276	June	1963
III.	Detection of Two Antibodies in Single Plasma Cells by the Paired Fluorescence Technique.	R. N. Hiramoto, M. Hamlin	*Journal of Immunology*	95	2	214-224	Aug.	1965
IV.	Fluorescent Antibody Staining	B. T. Wood, S. H. Thompson, G. Goldstein.	*Journal of Immunology*	95	2	225-229	Aug.	1965
V.	Chromatographic Purification of Tetramethylrhodamine-Immune Globulin Conjugates and Their Use in the Cellular Localization of Rabbit Gamma-Globulin Polypeptide Chains.	John J. Cebra, Gerald Goldstein	*Journal of Immunology*	95	2	230-245	Aug.	1965
VI.	The Stability of Messenger Ribonucleic Acid in Antibody Synthesis.	Velta Lazda, Jason L. Starr	*Journal of Immunology*	95	2	254-261	Aug.	1965
VII.	The Course of Non Specific Ulcerative Colitis: Review of Twenty Years Experience and Late Results.	Benjamin M. Banks, Burton I. Korelitz, Louis Zetzel.	*Gastroenterology*	32	6	983-1012	June	1957
VIII.	Occlusion of the Hepatic Veins in Man	R. G. F. Parker	*Medicine*	38	4	369-402	Dec.	1959

A 58

5. (a) Plaintiff publishes 37 medical journals, all of which are copyrighted. Of these, 26 are published in conjunction with professional societies, with the copyright being owned by plaintiff in 13 of such journals and the societies owning the copyright in the remaining 13. The journal *Medicine* is published by plaintiff for its own benefit, *i.e.*, not in conjunction with a professional society. The journal *Pharmacological Reviews* is and has been published by plaintiff since 1909 in conjunction with the American Society for Pharmacology and Experimental Therapeutics. The *Journal of Immunology* is and has been published by plaintiff for about 50 years in conjunction with the American Association of Immunologists. The journal *Gastroenterology* is and has been published by plaintiff since 1946 in conjunction with the American Gastroenterological Association. The four journals above named are published with notice of copyright in plaintiff's name. Plaintiff has contracts with the above-noted professional societies, which contracts deal in part with copyright. Although there are differences in phraseology among the contracts, such differences have led to no problems in dealings between plaintiff and the societies with respect to copyright matters. So far as the record shows, the parties to the contracts consider it the responsibility of plaintiff to enforce the copyright by granting licenses or instituting appropriate lawsuits.

(b) The agreement relating to copyright between plaintiff and the American Society for Pharmacology and Experimental Therapeutics (ASPET), under which agreement *Pharmacological Reviews* is published, provides as follows:

* * * * *

> 5. COPYRIGHT. The Society is sole owner of the periodical but for the sake of convenience, copyright shall be taken out in the name of the Publisher. Procurement of copyright of each issue is the duty of the Publisher and the costs incident thereto shall be charged to the profit-and-loss account of the periodical. The Publisher may publish or permit others to publish excerpts from the periodical after publication but such excerpting shall not be so substantial as to interfere with the sale of the periodical.
>
> * * * * *
>
> 10. REVERSION OF RIGHTS. In case of bankruptcy, assignment for benefit of creditors, or liquidation for any cause of the Publisher, or upon termination

of this Agreement for any cause stipulated herein, all rights conveyed under this Agreement by the Society to the Publisher shall revert to the Society forthwith.

* * * * *

The agreement was in effect at all times here material. There is no evidence that ASPET objected to, acquiesced in, or was any way involved with, the bringing of this suit by plaintiff.

(c) The agreement relating to copyright between the American Association of Immunologists (AAI) and plaintiff, under which agreement the *Journal of Immunology* is published, provides as follows:

* * * * * *

5. *PROCUREMENT OF COPYRIGHT.* The Association is the owner of the periodical but for the convenience of both parties copyright shall be procured by and in the name of the Publisher, and the costs incident thereto shall be charged to the profit-and-loss account of the periodical. *The Association reserves the right to have the copyright assigned to the Association if at any time in the future this seems desirable.* [Emphasis supplied.]

* * * * *

The agreement was in effect at all times here material. There is no evidence that AAI ever exercised its right to have assigned to it by plaintiff the ownership of any copyright registration in the *Journal of Immunology*. Nor is there evidence to show that AAI objected to, acquiesced in, or was any way involved with, the bringing of this suit by plaintiff.

(d) The agreement relating to copyright between the American Gastroenterological Association (AGA) and plaintiff, under which agreement *Gastroenterology* is published, provides as follows:

* * * * *

(2) COPYRIGHT. The Association grants to the Publisher the exclusive right to copyright, in the name of the Publisher, and to renew such copyrights, all material published in the said Journal, and to publish the said work in all languages during the term of the copyright.

* * * * *

The agreement has been in effect since 1942. There is no evidence that AGA objected to, acquiesced in, or was in any way involved with, the bringing of this suit by plaintiff.

6. (a) The Count I-to-Count VIII articles were published in their respective journals on or about the dates indicated in finding 4. The journals were published with a notice of copyright consisting of the word "Copyright," the symbol "©", the name "The Williams & Wilkins Company," and the year of publication affixed to the title page of, and elsewhere on, each journal. In due course, the Register of Copyrights issued to plaintiff, with respect to each of the journals, the following certificates of registration:

Journal	Certificate of Registration Number
Medicine, Vol. 44, No. 6	B 231973
Pharmacological Reviews, Vol. 15, No. 2	B 49574
The Journal of Immunology, Vol. 95, No. 2	B 216408
Gastroenterology, Vol. 32, No. 6	B 663158
Medicine, Vol. 38, No. 4	B 809926

(b) Only the issue of liability is now before the court; accounting, if any, is reserved for later proceedings. Defendant admits that at least one photocopy of each of the Count I-to-Count VIII articles was made by defendant's NIH or NLM without authorization of plaintiff within the pertinent accounting period, as follows:

Article	Date Photocopied	Name of Requester
Count I	9/29/67	Backman
" "	10/5/67	Gabor
" "	10/19/67	Backman
Count II	9/29/67	McCallum
Count III	9/27/67	McEnany
Count IV	9/27/67	McEnany
" "	11/13/67	Reynolds
Count V	9/27/67	McEnany
" "	11/13/67	Reynolds
Count VI	9/27/67	McEnany
Count VII	10/12/67	Bird
Count VIII	2/11/68	Pitcher
" "	12/68	Young

The persons named above as "Requester" are all physicians or other professional medical personnel who requested from NIH or NLM copies of the articles in connection with medical research work or patient care at NIH or elsewhere. The copies were retained by the requesters who, for the most

part, kept them in personal files as permanent documents for later reference and use, or put them in files available for use by coworkers or colleagues. The request by Dr. Pitcher of the Count VIII article was to NLM through an Army hospital library in Japan. All other requests listed above were to the NIH library and were made directly by the requester.

7. The number of subscriptions in the year 1969 and the annual subscription prices for the journals involved in this suit are as follows:

Journal	Approximate Number of Subscriptions	Price
Medicine	5,400	$12.00
Pharmacological Reviews	3,100	15.00
Journal of Immunology	4,700	[1] 22.00
		[2] 44.00
Gastroenterology	7,000	[1] 12.50
		[2] 25.00

[1] Members.
[2] Nonmembers.

8. Plaintiff's journals, noted in finding 7, are widely distributed in medical libraries throughout the country, are in the collection at the NIH library and are included on a list of journals of widespread availability compiled by NLM.

9. (a) Plaintiff's function, as a publisher of medical and scientific journals and books, is to determine what is needed to advance knowledge in the field of medicine; determine who is qualified to write on that subject; and edit, produce and market their manuscripts. Plaintiff accepts manuscripts from physicians and related medical professionals for publication in an appropriate journal. The considerations which influence a contributor of a manuscript as to the journal to which to submit the manuscript include (i) the subject matter and length of the manuscript, (ii) the quality of articles published in the journal, (iii) the standing of the journal's editorial board, (iv) the nature of the journal's readership, and (v) the circulation of the journal. Contributors rarely publish their own articles because of the high cost involved and because acceptance by a leading journal marks the article as one of high quality. *E.g.*, *Gastroenterology* is considered the outstanding journal in its speciality field in the United States and probably in the world. Contributors submit man-

uscripts to *Medicine* because that journal publishes lengthy, definitive articles and is well-disseminated.

(b) A board of editors of each of plaintiff's journals screens the submitted manuscripts, and manuscripts suitable for publication are edited and revised, as necessary and within the discretion of the editors. Often, substantial editing is done by the editorial board; sometimes contributors are required to revise manuscripts prior to acceptance. If a journal is the official organ of a professional society, the society appoints the board of editors. The editors are responsible to the society and are compensated by the society which, in turn, shares with plaintiff the profits from journal sales, in accordance with the particular contractual relationship between plaintiff and the society. Revenues from plaintiff's journals are derived largely through subscription sales and also through advertising. The American Gastroenterological Association and the American Association of Immunologists get 50 percent of the profits from *Gastroenterology* and the *Journal of Immunology*, respectively. The American Society for Pharmacology and Experimental Therapeutics gets 90 percent of the profits from *Pharmacological Reviews*. Printing preparation costs are about 50–65 percent of the total cost of publication of plaintiff's journals.

10. (a) Authors whose manuscripts are accepted and published by plaintiff, including the authors of the articles here in suit, are not paid monetary compensation by plaintiff; moreover, some journals require that authors pay a fee for published pages in excess of a preselected number of pages. Authors are, however, compensated when plaintiff publishes their works by enhancement of their professional status, in that their works are screened by highly critical editors and are published in journals having wide dissemination and high reputation. Authors, therefore, submit manuscripts to plaintiff for dual purposes: to disseminate medical information for the public welfare; and to seek recognition from the scientific community from which flows increased professional and economic opportunity. Most articles published in plaintiff's journals, and like journals, are the result of research work done under private or public grant; and sometimes a requirement of the grant is that the research worker will seek to have the results of the work published. Sometimes, the grants include funds to pay for excess-page charges to a journal publisher.

(b) Ordinarily, there is no written agreement entered into between plaintiff and the authors of submitted manuscripts with respect to ownership of articles stemming from the manuscripts. However, by longstanding custom and absent any written or oral agreement to the contrary, an author who submits a manuscript for publication in a medical or other scientific journal assigns to the owner of the journal (i) the author's proprietary rights in any article stemming from the manuscript, (ii) the right to secure statutory copyright in any such article, and (iii) the right to enforce the copyright under the Federal copyright laws. There is no evidence that the authors of the articles in suit, or any like authors, ever questioned or challenged the ownership rights of plaintiff, or any like publisher of journal articles, or the right and authority of plaintiff, or any like publisher, to secure and enforce the statutory copyright in such articles.

11. Authors whose articles are published by plaintiff usually purchase from plaintiff reprints of their articles (on the average, about 300) for distribution to interested colleagues. In general, the number of reprints purchased by authors, per article, has not changed over the past 10 years. Most authors distribute reprints free of charge to those requesting them. Depending upon the importance of, and professional interest in, a particular article, all reprints are distributed by authors within several months up to several years after publication. If someone requests directly from plaintiff a copy of an article appearing in one of plaintiff's journals, plaintiff first refers the requester to the author for a reprint; then offers to sell (either directly or through a licensed reprint house) a back copy of the issue in which the article appeared; and, finally, refers the requester to the Institute of Scientific Information, plaintiff's licensee for making photocopies. (Finding 36.) Authors who want to reprint one of their articles from one of plaintiff's journals request plaintiff's permission to do so. Others wanting to reprint articles from one of plaintiff's journals usually ask permission of the author, as a matter of courtesy, and ask permission of plaintiff, as the copyright owner.

12. (a) NIH constitutes 10 institutes, each of which is concerned with a specialty of health and medical care. The mission of NIH is to advance health and well-being through the support of research in diseases, the support of educa-

tional and medical institutions, and improved biomedical communications. Generally, three types of activities are carried on by NIH: education and manpower training; communication of medical information; and research conducted by the various institutes. Research, as well as education and manpower training, is performed by Government employees of the institutes and also by private persons and organizations supported by NIH grants. Biomedical communication is the function of NLM. (Finding 20.) NIH employs over 12,000 persons, 4,000 of whom are professionals and 2,000 of whom have doctoral degrees. In fiscal 1970, NIH spent over $1.5 billion for medical research, about $100 million of which was for intramural medical research. The balance was spent either for other intramural programs or for grants to outside organizations.

(b) Total national support of medical research, both Federal and non-Federal, has increased enormously in the period 1950–1970. In 1950, only about $160 million were spent. By 1970, the total spent was $2.7 billion. In 1950, the Federal Government contributed less than half the funds available for medical research. In 1970, the Federal Government contributed nearly two-thirds.

13. A library is essential to the conduct of medical research. A principal product of research scientists is their publications and publication of results is a vital part of research. NIH maintains and operates a technical library which is open to the public. The library houses about 125,000 to 150,000 volumes, of which 30,000 are books. The balance is periodicals or journals. The NIH library subscribes to over 3,000 different journal titles, of which 600 are purchased in multiple copies. The functions of the NIH library include acquisition, selection and cataloging of journal and book materials, preparation of reference services, response to queries for specific information, bibliographic services, formulation of computerized searches, a translation unit, housekeeping service, and a library copy service. The library's budget for 1970 was about $1.1 million.

14. The NIH library subscribes to all 37 journals which plaintiff publishes. For about one-third of such journals, the library gets more than one copy. The library gets two copies of each of the four journals involved in this suit.

15. As an integral part of its operation, the NIH library operates a comprehensive system of providing photocopies

of articles in scientific journals. Photocopying at the NIH library (as well as at NLM) includes making a photographic copy of an article on microfilm, and then using the microfilm for further photocopying. The NIH photocopying service uses two Xerox copying machines and two Recordac microfilm cameras. The microfilm cameras are used in conjunction with a Xerox Copy-Flo printer to provide NIH personnel with permanent copies of journal articles. The microfilm is destroyed after a hard Xerox copy is made. NIH leases its Xerox machines from Xerox Corporation which it pays according to the number of pages photocopied. Microfilm used to photocopy articles at the NIH library is sent to NLM for processing. Such processing could be done by any commercial developer having the necessary equipment. Four regularly assigned employees operate the NIH photocopy equipment. In fiscal 1970, the library's photocopying budget was $86,000 and the library filled 85,744 requests for photocopies of journal articles, constituting about 930,000 pages. The average request was about 10–12 pages and the average cost per request was about $1.

16. Photocopying services of the NIH library are available only to NIH personnel. Members of the general public, while they may use the library, are not permitted to have materials photocopied. Two kinds of service are provided: over-the-counter and by mail. To get a photocopy, the requester must submit a request slip and an authorization slip. Authorization slips permit copying of either 20 pages or less, or 6 pages or less. The requirement for authorization slips is a budgetary limitation to hold down photocopying costs. Costs of library operation, including photocopying, are shared by the various institutes of NIH on a pro-rata basis.

17. (a) The photocopying policies of the NIH library have been essentially the same from 1965 to the present. If the library subscribes to but one copy of a journal, that copy is maintained in the library for the use of readers. If the library subscribes to a second copy of a journal, such copy will circulate among interested persons at NIH. Upon the request of interested personnel, articles in journals are photocopied at no charge to the requester. The library's policy on photocopying is that, as a general rule, only a single copy of a journal article will be made per request and each request is limited to about 40 to 50 pages though exceptions may be,

and in fact have been, made in the case of long articles. Also, as a general rule, requests for photocopying are limited to only a single article from a journal issue. However, exceptions to this general rule are routinely made, so long as substantially less than an entire journal is photocopied, *i.e.*, less than about half of the journal. Coworkers can, and frequently do, request single copies of the same article and such requests are honored. Also, there is nothing in the library's photocopying policy to prevent a user from returning month after month to get photocopies of one or more articles from one issue of a journal.

(b) NIH library personnel will not knowingly photocopy an entire issue of a journal. However, it is possible for a single user to make a series of separate requests which will result in the photocopying of an entire issue. The photocopy equipment operators are instructed to bring to the attention of their supervisor what they believe to be attempts to copy a substantial part, or all, of a journal issue. Nevertheless, because of the large volume of photocopying done by the library, it is difficult and impractical to police and curb such attempts. Substantially more people receive photocopies of journal articles from the NIH library than would copy by hand substantial portions of articles. Photocopies made by the library are not returned by the users. Sometimes the users make further photocopies from photocopies obtained from the NIH library to distribute to colleagues or otherwise.

18. As a general rule, books (or monographs) which carry a copyright notice are not photocopied by the NIH library, even to the extent of a short chapter, without permission of the copyright owner. However, under special circumstances (the details of which are not clear from the record) and upon authorization of library supervisory personnel, exceptions are sometimes made to this rule to the extent of copying small portions, *e.g.*, charts or graphs, from books (or monographs).

19. Materials (*i.e.*, books and journals) not owned by the NIH library, and which are requested by users, are obtained by means of interlibrary loan. When an interlibrary loan is requested, the standard interlibrary loan form is used. Basically, the NIH library applies to interlibrary loan requests the same restrictions on photocopying as are applied to requests filled internally.

20. (a) The mission of NLM is the exchange and dissemination of medical information. NLM began as the library of the Surgeon General of the Army, which was founded in 1836. Later such library became the Armed Forces Medical Library; and in 1956, the library was transferred from the Department of Defense to the Public Health Service and renamed the National Library of Medicine. The statute creating NLM is codified as 42 U.S.C. §§ 275–280a (1970 ed.) which, in relevant part, reads as follows:

§ 275. **Congressional declaration of purpose; establishment.**

In order to assist the advancement of medical and related sciences, and to aid the dissemination and exchange of scientific and other information important to the progress of medicine and to the public health, there is established in the Public Health Service a National Library of Medicine (hereinafter referred to in this part as the "Library").

§ 276. **Functions.**

(a) The Secretary, through the Library and subject to the provisions of subsection (c) of this section, shall—

(1) acquire and preserve books, periodicals, prints, films, recordings, and other library materials pertinent to medicine;

(2) organize the materials specified in clause (1) of this subsection by appropriate cataloging, indexing, and bibliographical listing;

(3) publish and make available the catalogs, indexes, and bibliographies referred to in clause (2) of this subsection;

(4) make available, through loans, photographic or other copying procedures or otherwise, such materials in the Library as he deems appropriate;

(5) provide reference and research assistance; and

(6) engage in such other activities in furtherance of the purposes of this part as he deems appropriate and the Library's resources permit.

* * * * *

(c) The Secretary is authorized, after obtaining the advice and recommendations of the Board (established under section 277 of this title), to prescribe rules under which the Library will provide copies of its publications or materials, or will make available its facilities for research or its bibliographic, reference or other services, to public and private agencies and organizations, institutions, and individuals. Such rules may provide for

making available such publications, materials, facilities, or services (1) without charge as a public service, or (2) upon a loan, exchange, or charge basis, or (3) in appropriate circumstances, under contract arrangements made with a public or other nonprofit agency, organization, or institution.

§ 277. **Board of Regents.**

(a) Establishment; composition; * * *

There is established in the Public Health Service a Board of Regents of the National Library of Medicine * * *

(b) **Duties of Board;** * * *

It shall be the duty of the Board to advise, consult with, and make recommendations to the Secretary on important matters of policy in regard to the Library, including such matters as the acquisition of materials for the Library, the scope, content and organization of the Library's services, and the rules under which its materials, publications, facilities, and services shall be made available to various kinds of users, * * *

* * * * *

(b) There is no evidence that the Surgeon General or any other agent of defendant has issued regulations implementing 42 U.S.C. § 276(c).

(c) The basic function of NLM is to acquire books, journals and the like relating to health and medicine to assure that all medical literature is available at one place. In addition to acquisition, NLM indexes and catalogs medical literature by means of *Index Medicus*, which is a compilation of citations to about 2,400 leading biomedical journals. *Index Medicus* is sold to the medical profession and enables medical practitioners to keep abreast of the current medical literature. NLM's catalog announces new publications and acquisitions by the library, thus providing a ready reference for other libraries.

21. (a) NLM has five operating components, one of which is called Library Operations. The Reference Services Division of Library Operations is responsible for administering the interlibrary loan system, which is a system whereby one library may request materials from other libraries. NLM also receives requests for loans of materials from Government institutions, medical schools, hospitals, research foundations, private physicians, and private companies including drug companies. NLM provides the same service to com-

mercial companies as it does to governmental and academic libraries. Requests by commercial companies, particularly drug companies, account for about 12 percent of NLM's service. Upon a request for materials, NLM determines whether to loan out the original material or to make photocopies of the material. As a general rule, articles from journals, when requested, are photocopied and the photocopies given free of charge to the requester, so that, in the case of journals, the term "loan" is a euphemism. If NLM receives a request for a paid photographic service which otherwise meets the conditions of an interlibrary loan, payment is rejected and a loan or photocopy is furnished free of charge.

(b) To make photocopies, NLM uses mobile 35-mm. microfilm cameras which have an electrical power line overhead and can move up and down an aisle of the library. Full-size photocopies are then made from the microfilm. Most photocopies are made by such microfilm technique. In fiscal 1968, NLM received about 127,000 requests for interlibrary loans, of which about 120,000 were filled by photocopying. Applying the average of 10 pages per request, about 1.2 million pages were thus photocopied.

22. (a) Interlibrary loan requests must be accompanied by a proper form, the format of which is standardized and used by libraries and other institutions throughout the United States. The loan form, as a general rule, must be signed by a librarian. However, NLM will at times honor requests from individuals (*e.g.*, physicians) or nonlibrary institutions. Upon receipt of requests for interlibrary loans, NLM stamps the requests by date and time, counts them for statistical purposes, and begins the sorting procedure. Generally, NLM does not know, nor does it make any attempt to find out, the purpose of the requests. NLM will supply copies of the same journal article to an unlimited number of libraries requesting copies of an article, one after the other, on consecutive days, even with knowledge of such facts.

(b) NLM is a regional medical library and serves the mid-Atlantic region. Requests for materials coming from regions other than the mid-Atlantic region are generally referred to the appropriate regional library, and the requester is advised to submit future requests to the appropriate regional library. NLM's stated policy in recent years is not to fill requests for copies of articles from any of 104 journals which are included on a so-called "widely-available list." Rather, the requester

is furnished a copy of the "widely-available list" and the names of the regional libraries which are presumed to have the journals listed. Exceptions are sometimes made to the policy, particularly if the requester has been unsuccessful in obtaining the journal elsewhere. The four journals involved in this suit are listed on the "widely-available list." A rejection on the basis of the "widely-available list" is made only if the article requested was published during the preceding 5 years. Requests from Government libraries are not rejected on the basis of the "widely-available list."

(c) NLM's policy is not to honor an excessive number of requests from an individual or an institution. As a general rule, not more than 20 requests from an individual, or not more than 30 requests from an institution, within a month, will be honored. In 1968, NLM adopted the policy that no more than one article from a single journal issue, or three from a journal volume, would be copied. Prior to 1968, NLM had no express policy on copying limitations, but endeavored to prevent "excessive copying." As a general rule, requests for more than 50 pages of material will not be honored, though exceptions are sometimes made, particularly for Government institutions. Requests for more than one copy of a journal article are rejected, without exception. If NLM receives a request for more than one copy, a single copy will be furnished and the requester advised that it is NLM's policy to furnish only one copy. Generally, requests for photocopies from books (or monographs) are rejected. NLM lends books (or monographs) for limited periods of time. In special cases (the details of which are not clear in the record), small portions of a book (or monograph), *e.g.*, charts or tables, will be photocopied.

23. (a) NLM, from time to time, issues statements to other libraries of its interlibrary loan policy. Its policy has remained essentially unchanged over the years. The statement of policy, as of January 1968, reads in pertinent part as follows:

* * * * *

> Readers who cannot obtain medical literature in their regions and who cannot come to the National Library of Medicine in person may use the interlibrary loan service of the Library by applying through a local library *subject to compliance with the following regulations and instructions and the provisions of the General Interlibrary*

Loan Code. A large number of titles should not be requested at one time for one applicant or one institution.

FORMS OF LOANS

1. The National Library of Medicine reserves the right to determine whether material will be lent in the original form or as a photoduplicate.

2. Photoduplicates sent instead of original material will be supplied without charge to requesting libraries. Photoduplicates may be retained permanently by the borrowing library, unless return is specifically requested by NLM.

3. Since this is an interlibrary loan service, multiple copies will not be furnished.

4. With sufficient justification NLM may lend complete issues or volumes of serials when such loan does not impair other service, but in no case will complete issues or volumes or substantial portions of issues or volumes be copied as a loan. Copying of complete issues or volumes may be considered under special photographic services.

5. Original material will not be lent outside the United States.

METHOD OF BORROWING

1. Borrowing libraries will submit *typed* requests on the Interlibrary Loan Request form approved by the American Library Association. Requests made by letter or on other types of forms cannot be processed and will be returned to sender. Each item or item segment must be requested on a separate form.

2. Order of citation must follow directions on the Interlibrary Loan Request form.

3. Each request must be authenticated, in handwriting, by authorized personnel in the borrowing library. Unsigned requests will be returned.

4. It is expected that under all but the most unusual circumstances librarians will avail themselves of the resources of their region before directing requests to NLM.

* * * * *

SPECIAL PHOTOGRAPHIC SERVICES

1. Special photographic procedures are required to reproduce some items in the collection, and a charge will be made for this service. Cost estimates are available on request. NLM will consider requests for copying items such as: portraits, photographs, etchings, and other pictorial work; text and line drawings; facsimile reproductions; long runs of periodicals to complete holdings.

2. Advance payment is required for all such photocopying when the requests emanate from outside the Federal Government. Orders for materials in which there is a question of copyright restriction will not be accepted for special photographic service without an accompanying permission statement from the copyright owner.

(b) NLM operates its interlibrary loan system in accordance with the General Interlibrary Loan Code, as revised in 1956. The Code states in pertinent part:

IX. *Photographic Substitution*

1. Time may be saved in filling the reader's request if, in the application for a loan, willingness is indicated to purchase a photographic reproduction as a satisfactory substitute should the original material be unavailable for interlibrary loan. This is especially applicable to periodical and newspaper articles and to typescript theses.

2. The type of photographic duplication (as a substitute) that is acceptable (*e.g.*, photostat; microfilm—negative or positive; record print; etc.) and the maximum price the borrowing library is willing to pay can appropriately be indicated on the original request. If preferred, the lending library may be asked to quote the estimated cost of such a substitution before filling the order.

3. Photographic duplication in lieu of interlibrary loan *may be complicated* by interpretations of copyright restrictions, particularly in regard to photographing *whole issues* of periodicals or books with *current copyrights*, or in making *multiple copies* of a publication.*

4. Any request, therefore, that indicates acceptability of a photographic substitution, under the conditions described above, should be accompanied by a statement with the signature of the applicant attesting to his responsibility for observing copyright provisions in his use of the photographic copy.*

5. Requests indicating acceptability of photographic substitute in lieu of interlibrary loan that comply with the above provisions are to be considered *bona fide* orders for copying services. The lending library, if equipped to do so, may fill such orders with no further correspondence or delay.

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*These statements on photographic substitutions are based on the "Gentlemen's Agreement" written in 1935 by the National Association of Book Publishers (reaffirmed in 1938 by its successor the Book Publishers Bureau) and the Joint Committee on Materials for Research (representing the libraries). For the text of this agreement see the *Journal of Documentary Reproduction*, 2:29–30, March 1939. [Finding 41.]

24. Photocopies at NLM, for interlibrary loa. purposes, are prepared using a microfilm camera and a Xerox Copy-Flo machine. Copying for in-house administrative purposes, oversized material, and material in oriental languages is done on Direct Copy Xerox 720 machines. Microfilm is destroyed after use. Each photocopy produced by the microfilm camera includes a statement as follows:

> This is a single photostatic copy made by the National Library of Medicine for purposes of study or research in lieu of lending the original.

25. Since 1966 through 1970, there has been a steady decline in the amount of material or number of requests filled for photocopies through the interlibrary loan program of NLM. In 1969, the number of interlibrary loan requests filled was 110,573 and in 1970, 93,746. A principal reason for the decline is that regional libraries have taken on much of the burden of the program. The regional libraries operate in essentially the same manner as NLM except that some, if not all of them, charge a fee for photocopies furnished to requesters. The budget for the interlibrary loan operation at NLM in fiscal 1969 was $166,152.

26. The Count I, IV, V, and VI articles acknowledge on their faces that the research work reported therein was supported in part by grants awarded to the authors by the Public Health Service of NIH.

27. The Division of Research Grants of the Public Health Service is a service organization to NIH. Applications for grant support from NIH come to the Division of Research Grants, which determines the institute of NIH to which they shall be referred and the review group to which the application shall be assigned. Such group then reviews the application and determines its scientific merit, and also reviews the application's proposed budget with respect to, *e.g.*, salaries for personnel, equipment, supplies and services, travel funds, funds for the purchase of publications or journals, and funds for the payment of page charges and other costs of publications. The group's recommendation is transmitted to the appropriate institute. If a grant is subsequently awarded, the appropriate institute provides the funds and monitors the performance of the work under the grant. Grants are awarded on an annual basis and are characterized by the Public Health Service as "conditional gifts." NIH sometimes

indicates at the beginning that it will support renewal applications. Renewal applications are administered by the Division of Research Grants. The scientific investigator under a grant award can pursue his research in any manner he feels appropriate, subject to limited budgetary control. Such investigators are not Government employees nor are they in the service of the United States; and the Public Health Service does not exercise supervision over the scientific techniques used in the research.

28. The Division of Research Grants, from time to time, issues policy statements with respect to copyright which set out guidelines delimiting the rights and responsibilities of grantees under NIH grants. The policy statements in effect for the years 1956 to the present are set out below in subparagraphs (a) to (d).

(a) With respect to grants awarded from November 1956 to 1959, the Public Health Service policy governing copyright was as follows:

> When a grant or award is made without condition and a book or related material is privately published, the author is free to copyright the work and to make arrangements with his publisher as if the Government had not contributed support.

(b) With respect to grants awarded from 1959 to January 1, 1963, the Public Health Service policy governing copyright was as follows:

> *Copyright.*—The author is free to arrange for copyright without reference to the Public Health Service.

(c) With respect to grants awarded from January 1, 1963 to July 1, 1965, the Public Health Service policy governing copyright was as follows:

> COPYRIGHT The author is free to arrange for copyright without approval by the Public Health Service.

(d) With respect to grants awarded on or after July 1, 1965, the Public Health Service policy governing copyright was as follows:

> **Copyright** Except as otherwise provided in the conditions of the award, when publications result from work supported by the Public Health Service, the author is free to arrange for copyright without approval. Any such copyrighted publications shall be subject to a

royalty-free, non-exclusive, and irrevocable license to the Government to reproduce them, translate them, publish them, use and dispose of them, and to authorize others to do so.

29. None of the Count I-to-Count VIII articles resulted from a Public Health Service grant which imposed conditions expressly modifying the copyright policies noted in finding 28, subparagraphs (a) to (c).

30. The policy statement dated July 1, 1965 (finding 28(d)), was the first public statement by the Public Health Service that it reserved the right to duplicate copyrighted works which resulted from Public Health Service grants. Prior to 1965, the Public Health Service had not addressed itself to the question of whether the Government should have a nonexclusive license in works resulting from grant funds, though it had for some years been the policy that such works could be photocopied (up to 15 copies) for in-house administrative purposes.

31. The copyright policy of the Public Health Service, noted in finding 28(d), which by its terms was to become effective in connection with work supported by grants awarded on or after July 1, 1965, appeared in the *Federal Register*, in modified form, for the first time on April 2, 1970, at 35 Fed. Reg. 5470 (42 C.F.R. § 52.23 (revised as of Jan. 1, 1971)).

32. Dr. Victor A. McKusick, a coauthor of the Count I article, started research, along with several coworkers, in 1954 on the subject matter of the article. Work has continued up to the date of trial. The research was supported in part by funds from a Public Health Service grant; in part by funds from grants from the Health Research Council, a private trust; and in part by other funds which cannot be traced to any specific grant or agency. The manuscript for the Count I article was submitted to the editor of *Medicine* on August 19, 1964, and the article was published on December 9, 1965. Changes to reflect ongoing research were made in the manuscript by the authors from time to time, up to about 6 months before publication (*i.e.*, about mid-1965). After about mid-1965, any changes in the manuscript were editorial in nature, *e.g.*, citations to new articles added as footnotes, stylistic changes, and the like. There is no evidence that the article reports any substantive research work done under funds from

a Public Health Service grant awarded on or after July 1, 1965.

33. Dr. Gerald Goldstein, a coauthor of the Count IV article, conducted research leading to its publication, which research was funded in part by Public Health Service grants. Such grants covered the years 1958 to 1966. The Count IV article was published in the *Journal of Immunology* in August 1965. There is no evidence to show when the manuscript for such article was completed, though the article states on its face that it was "received for publication" on December 18, 1964. There is no evidence to show that the article reported any substantive research work done under funds from a Public Health Service grant awarded on or after July 1, 1965.

34. Dr. John J. Cebra, a coauthor of the Count V article, conducted research leading to its publication, which research was funded in part by Public Health Service grants. The Count V article was published in the *Journal of Immunology* in August 1965. There is no evidence to show when the manuscript for such article was completed, though the article states on its face that it was "received for publication" on December 17, 1964. There is no evidence to show that the article reported any substantive research work done under funds from a Public Health Service grant awarded on or after July 1, 1965.

35. Dr. Jason L. Starr, a coauthor of the Count VI article, conducted research leading to its publication, which research was funded in part by Public Health Service grants. The Count VI article was published in the *Journal of Immunology* in August 1965. There is no evidence to show when the manuscript for such article was completed, though the article on its face states that it was "received for publication" on December 21, 1964. There is no evidence to show that the article reported any substantive research work done under funds from a Public Health Service grant awarded on or after July 1, 1965.

36. Plaintiff has established a licensing program to cover various forms of exploitation of its medical journals. The program includes the following:

(i) Upon request, plaintiff grants permission, in the form of licenses, for reproducing a journal article as part of a newly published book or for reproducing articles in other forms, particularly for use by educational institutions.

(ii) Plaintiff has received requests from Government agencies and others for licenses to make multiple copies of journal articles, and plaintiff has granted such requests and has been paid therefor.

(iii) Plaintiff has granted licenses for the distribution and sale of microfilm editions of its journals, including the four journals in suit, to University Microfilm Company, Ann Arbor, Michigan, and Arcadia Microfilms, Spring Valley, New York, in consideration for a royalty paid to plaintiff.

(iv) Plaintiff has granted licenses, for a consideration, to two reprint houses in New York to furnish a requester with a reprint of a journal article or an entire journal.

(v) Plaintiff has granted a royalty-bearing license to the Institute for Scientific Information, Philadelphia, Pennsylvania, to provide requesters with copies of articles from plaintiff's journals.

(vi) Plaintiff has granted to several libraries (Veterans Administration Hospital library in San Francisco, California, the Dugway Technical Library and the Wilkin Research Foundation of New York) a license to make, on a continuing basis, single copies of articles from journals in return for the payment of royalties. Such licenses, however, have not produced royalties to date and two of the licenses are no longer in effect. The license to Wilkin Research Foundation was entered into in February 1970 and provides for a royalty of 5 cents per copied page, with accumulated royalties payable yearly.

37. Plaintiff receives about 45 to 60 requests per week to make copies from its various publications, about five of such requests being for copies of single articles from plaintiff's journals. Requests for copies of journal articles are handled by plaintiff as set out in finding 11.

38. Plaintiff receives about $6,000 to $7,000 per year for permissions granted to individuals to copy journal articles (single copies and otherwise). Such receipts are in addition to royalties received from the Institute for Scientific Information, reprint houses and microfilm licensing.

39. (a) Between 1959 and 1969, annual subscriptions to *Medicine* increased from about 2,800 to about 5,400, though subscriptions decreased slightly from 1968 to 1969. Annual

subscription sales increased from about $20,000 to about $60,000; and total annual income increased from about $23,000 to about $65,000. Between 1964 and 1969, annual subscriptions to *Pharmacological Reviews* increased from about 2,600 to about 3,100, though subscriptions decreased slightly from 1968 to 1969. Annual subscription sales increased from about $19,000 to about $21,000; and total annual income increased from about $22,000 to about $25,000. Between 1959 and 1969, annual subscriptions to the *Journal of Immunology* increased from about 2,600 to about 4,700. Annual subscription sales increased from about $36,000 to about $131,000; and total annual income increased from about $38,000 to about $185,000. Between 1959 and 1969, annual subscriptions to *Gastroenterology* increased from about 4,100 to about 7,000. Annual subscription sales increased from about $49,000 to about $155,000; and total annual income increased from about $108,000 to about $244,000.

(b) Between 1959 and 1966, plaintiff's annual taxable income increased from $272,000 to $726,000. In 1967, it fell to $589,000; and in 1968, to $451,000. Plaintiff's four journals in suit account for a relatively small percentage of plaintiff's total business; and over the years, such journals have been profitable, except that the *Journal of Immunology* showed losses in the period prior to 1961; *Gastroenterology* showed losses in 1967–68; and *Pharmacological Reviews* showed a loss in 1969. Profits from the journals have varied from less than $1,000 to about $15,000 annually. Plaintiff's share of the profits from the journals published under contract with medical societies has ranged from less than $1,000 to about $7,000. *E.g.*, in 1968, profit from *Pharmacological Reviews* was $1,154.44 (on sales of about $40,000). The profit was divided, $1,039 to ASPET and $115.44 to plaintiff. In 1969, net income from *Gastroenterology* was $21,312.08 (on sales of about $245,000) and $11,532.35 of that amount was offset by losses the previous year, leaving a balance of $9,779.73. The balance was split between plaintiff and AGA, plaintiff getting $4,889.86.

There is no evidence to show whether any particular instance or instances of unauthorized photocopying of plaintiff's journals resulted in the loss of a particular form of revenue to plaintiff. It is reasonable to infer from the evidence, however, that extensive unauthorized photocopying of plaintiff's journals results in some loss of revenue

otherwise obtainable under plaintiff's licensing program. It is also reasonable to infer that plaintiff has lost, or failed to get, some undetermined and indeterminable number of journal subscriptions (perhaps small) by virtue of the availability of unauthorized photocopying. There is evidence that in at least one instance, a subscriber canceled a subscription to one of plaintiff's journals because the subscriber believed that the cost of photocopying of the journal had become less than the journal's annual subscription price. There is evidence that in another instance, a subscriber canceled a subscription at least in part because library photocopies were available.

40. (a) NIH (and so far as the record shows, NLM) has made no studies to determine the estimated costs over and above royalties which would be involved in paying publishers for photocopying part or all of their copyrighted journals. The costs involved in such an estimate would be essentially the salaries of the people who would make the necessary determinations. The Librarian of NIH testified that he is unable to make any estimate of such costs.

(b) In 1967, NLM temporarily ceased photocopying articles from plaintiff's journals. NLM was able, as a practical matter, to flag plaintiff's journals from April 27, 1967 to May 29, 1967, in order to refrain temporarily from copying from them. The flagging of plaintiff's journals was an administrative statistical operation performed by a library technician in the loan and stack section of NLM. On about May 29, 1967, NLM resumed photocopying articles from plaintiff's journals, and for about 90 days thereafter, NLM monitored such photocopying. Satisfied that such 90-day period was a representative sample, NLM found that it would have paid plaintiff about $250 to $300 if it had acceded to plaintiff's request for 2 cents royalty per page. The Director of NLM testified that, in his opinion, this was "a very small sum—surprisingly small sum."

41. (a) In 1935, there was issued a joint statement by the National Association of Book Publishers and the Joint Committee on Materials for Research regarding the photocopying by libraries and like institutions of copyrighted materials. The statement, later to become known as the "gentlemen's agreement," was the product of meetings and discussions between representatives of the book publishing industry and research-and-education-oriented organizations,

such as libraries. The representatives were interested in working out a practical accommodation of the conflict between (i) the legitimate interest of copyright owners not to have their works copied without compensation and (ii) the needs of scholars and research workers for copies of parts of copyrighted works to use in pursuit of scientific or literary investigation. The "gentlemen's agreement," along with the introductory statement accompanying it, reads as follows:

> The Joint Committee on Materials for Research and the Board of Directors of the National Association of Book Publishers, after conferring on the problem of conscientious observance of copyright that faces research libraries in connection with the growing use of photographic methods of reproduction, have agreed upon the following statement:
>
> A library, archives office, museum, or similar institution owning books or periodical volumes in which copyright still subsists may make and deliver a single photographic reproduction or reduction of a part thereof to a scholar representing in writing that he desires such reproduction in lieu of loan of such publication or in place of manual transcription and solely for the purposes of research; provided
>
> (1) That the person receiving it is given due notice in writing that he is not exempt from liability to the copyright proprietor for any infringement of copyright by misuse of the reproduction constituting an infringement under the copyright law;
>
> (2) That such reproduction is made and furnished without profit to itself by the institution making it.
>
> The exemption from liability of the library, archives office or museum herein provided for shall extend to every officer, agent or employee of such institution in the making and delivery of such reproduction when acting within the scope of his authority of employment. This exemption for the institution itself carries with it a responsibility to see that library employees caution patrons against the misuse of copyright material reproduced photographically.

Under the law of copyright, authors or their agents are assured of "the exclusive right to print, reprint, publish, copy and vend the copyrighted work," all or any part. This means that legally no individual or institution can reproduce by photography or photo-mechanical means, mimeograph or other methods of reproduction a page or any part of a book without the written permission of the owner of the copyright. Society, by law,

grants this exclusive right for a term of years in the belief that such exclusive control of creative work is necessary to encourage authorship and scholarship.

While the right of quotation without permission is not provided in law, the courts have recognized the right to a "fair use" of book quotations, the length of a "fair" quotation being dependent upon the type of work quoted from and the "fairness" to the author's interest. Extensive quotation is obviously inimical to the author's interest.

The statutes make no specific provision for a right of a research worker to make copies by hand or by typescript for his research notes, but a student has always been free to "copy" by hand; and mechanical reproductions from copyright material are presumably intended to take the place of hand transcriptions, and to be governed by the same principles governing hand transcription.

In order to guard against any possible infringement of copyright, however, libraries, archives offices and museums should require each applicant for photo-mechanical reproductions of material to assume full responsibility for such copying, and by his signature to a form printed for the purpose assure the institution that the duplicate being made for him is for his personal use only and is to relieve him of the task of transcription. The form should clearly indicate to the applicant that he is obligated under the law not to use the material thus copied from books for any further reproduction without the express permission of the copyright owner.

It would not be fair to the author or publisher to make possible the substitution of the photostats for the purchase of a copy of the book itself either for an individual library or for any permanent collection in a public or research library. Orders for photo-copying which, by reason of their extensiveness or for any other reasons, violate this principle should not be accepted. In case of doubt as to whether the excerpt requested complies with this condition, the safe thing to do is to defer action until the owner of the copyright has approved the reproduction.

Out-of-print books should likewise be reproduced only with permission, even if this reproduction is solely for the use of the institution making it and not for sale.

(*signed*) ROBERT C. BINKLEY, *Chairman*
Joint Committee on Materials for Research
W. W. NORTON, *President*
National Association of Book Publishers

(b) In the 1930's, photocopying of books and like materials was done principally by conventional photographic techniques. Starting about 1960, the new technology of electrostatic copying and other rapid, inexpensive copying techniques resulted in a dramatic increase in the instances and amounts of photocopying. During the past 10 years, the propriety of library photocopying has been the subject of many discussions at meetings and conferences of library and information groups. In 1957, the Director of NLM noted that "it is possible, if not indeed probable, that the years would bring, sooner or later, a test of the issue in the courts" posed by NLM's photocopying activities and the copyright law.

(c) Plaintiff's principal officers became aware of large-scale library photocopying in about 1962. Immediately thereafter, plaintiff's president made his views on the subject known to various library groups. In the course of exchanges with librarians, plaintiff's president learned of the statement called the "gentlemen's agreement" and expressed his views thereon essentially as follows: The statement is inconsequential to the issues of present-day photocopying because (i) it was written in the 1930's when copying processes consisted of blueprints, photostats or microfilm, processes significantly different from those principally used today, (ii) one party to the statement (National Association of Book Publishers) is a long-defunct organization to which plaintiff never belonged, and (iii) the National Association of Book Publishers apparently consisted not of periodical publishers, like plaintiff, but book publishers who were concerned with the publication (and unauthorized photocopying) of books (or monographs).

42. (a) In October 1966, defendant's General Services Administration issued a handbook, COPYING EQUIPMENT, identified by code number FPMR 101–6. The purpose of the handbook was to acquaint Government supervisory personnel with the various photocopying machines available on the market and to encourage Government agencies to make use of such machines in an economic and efficient manner. The introduction to the handbook notes as follows:

> With the dispersal of office copiers throughout Government agencies, the need for a good hard look at the economy and effectiveness of office copying services has become increasingly apparent. The uncontrolled acquisition and use of office copying equipment has often re-

sulted in uneconomical mismatches of user requirements with machine capabilities and wasteful practices in operating copying facilities.

The introduction goes on to say that large organizational units should make studies of needs for equipment before making substantial investments. It is further noted:

> Where such studies have not been made, an inquiry into the existing copying facilities will offer a high potential for savings. As a minimum, a goal of 10% reduction in overall copying and related paperwork costs would be feasible. This handbook has been prepared to guide managers and others responsible for office copying in providing economical and effective copying service which meets user requirements.

(b) The "Foreword" to the handbook notes in part:

> The impact of document copiers on Federal operations has been substantial just as it has been in commerce and industry. At this writing there are at least 202 models of copiers available from some 37 different manufacturers or distributors. The United States Government alone has installed approximately 55 thousand machines and the yearly cost of office copying is estimated at 80 million dollars. An increasing number of cost-conscious executives are concerned about the predictions that this cost could double within the next 5 years.

(c) Chapter III of the handbook is entitled "Legal Aspects" and reads as follows:

Copying Laws

Copying laws are almost in the same category as speed limit laws—people forget they are there. Although the former involves much less risk than the latter, the penalty can be much greater. Most documents which are prohibited by law from being copied have their source in State or Federal Government. A partial listing is shown in figure 1. In case of doubt, legal advice should be obtained.

Copyright Laws

The most frequently violated law is the Copyright Law: namely, that law which prohibits the copying of copyrighted material without permission.

The Copyright Law is intended to protect the publisher or author from plagiarism. It gives him the right to say who may reproduce his written or published work, and to demand payment for it. However, the current widespread use of copying machines in reproducing lit-

erary works goes beyond the question of plagiarism. It is beginning seriously to affect the sale of published works, such as magazines, textbooks, and technical papers. Prior to this time, a user of such works desiring to have possession of a copy was obliged to purchase the publication if he could not borrow it for an indefinite period. Today, it is relatively simple to make copies of almost any printed matter by means of the office copier.

Because the copier has made it easy to reproduce published works, extra precaution is necessary. Where a notice of copyright is shown, either on the work itself, or by a general statement in the publication, the law is clear: it may not be copied unless permission of the publisher or author is obtained. Where doubt exists as to whether or not an item is copyrighted, the legal officer should be consulted.

Figure 1, accompanying Chapter III, is entitled "Material That May Not Be Copied" and notes in part:

1. Congress, by statute, has forbidden the copying of the following subjects under certain circumstances. There are penalties of fine or imprisonment imposed on those guilty of making such copies.

* * * * *

d. Copyrighted material of any manner or kind without permission of the copyright owner.

* * * * *

43. (a) The Board of Regents of NLM (finding 20(a)), at several meetings in 1957, considered the problems of copyright with respect to the operations of NLM. The minutes of those meetings are not in evidence. However, such minutes are discussed in a letter dated December 29, 1965, from Abraham L. Kaminstein, Register of Copyrights, to The Honorable John L. McClellan, United States Senate, as follows:

* * * * *

The new law amended a 1944 Public Health Service Act, which in 1956 was further amended by the transfer of the Armed Forces Medical Library to the newly established National Library of Medicine. The Act provides, *inter alia*, (42 U.S.C. 276) that the Surgeon General shall "make available, through loans, *photographic or other copying procedures or otherwise*, such materials as he deems appropriate . . ." [Italics supplied] The 1956 amendment to the Public Health Service Act also provides for the establishment by the Surgeon General of a Board of Regents, which as a part of its duties is the

[to?] prescribe "rules under which the Library will provide copies of its publications or materials." Since the provisions of section 398 are basically no different from the provisions of the 1956 amendment, it may be of interest to ascertain the administrative interpretation of that earlier copying provision.

A study of the minutes of the Board of Regents discloses that the agenda for the very first meeting of the Board, on March 20, 1957, included the distribution of a paper entitled Considerations for the Formulation of Loan Policy (of the National Library of Medicine). That paper contains a clear recognition of the copyright problem:

> "To start with, it must be pointed out that there are legal restrictions to the unlimited copying of published works; restrictions which are vague in some respects but which have been interpreted fairly definitely in most. The two most important interpretations for this problem are that whole works may not be copied and that multiple copies may not be made."

This policy paper was the subject of discussion at the meeting of the Board on April 29, 1957, at which the recommendations were approved. It is significant that the minutes of that meeting disclose the following:

> "Dr. Mumford [the Librarian of Congress] raised the question of copyright restrictions. It was stated that while the recommended new policy would not obviate the copyright problems, it would not raise more, and probably raise fewer difficulties in this area than does the current policy."

Further evidence that the Board was aware that copyright problems existed appeared in the minutes of the Board meeting for September 23, 1957, in the following notation:

> "The Director [of the National Library of Medicine] expressed his concern 'with the continuing vexing problem of copyright restrictions.' He indicated that the Library is proceeding as circumspectly as possible, but that it is possible, if not indeed probable, that the years would bring, sooner or later, a test of the issue in the courts . . . The Director took pains to indicate that despite the difficulties of the situation it seemed clear to him that the Library could do no other than pursue its present course, since a very large part, if not the major part, of the Library's services is dependent upon it."

The foregoing would appear to indicate that, from the outset of the establishment of the National Library of Medicine, there has been an awareness of the existence of copyright restrictions with respect to the use of the

copyrighted works in its collections. Nowhere does it appear that the policy-making body, the Board of Regents, considered that the above-quoted provision authorizing the Surgeon General to make the material in the Library available by "photographic or other copying procedures" was in any way in derogation of the rights granted under the copyright law to the proprietor of the copyright. On the contrary, the evidence indicates that the Library attempted to formulate a policy that would take due regard of the provisions of the copyright law.

* * * * * *

(b) In 1957, the then-Director of NLM, in discussing the problems created by NLM's policy of providing free photocopying services, stated as follows:

> Let us now take a critical look at what has happened under these policies. Free photocopying has developed beyond reasonable bounds. For example, in a recent study conducted over a two month period, it was found that over 50% of all requests received could be filled by photocopying journal articles from 125 common journal titles of the last five years.
>
> On the face of it, this is a need which the printing press, not the camera, is designed to fill. When a request from New York City is received for a photocopy of an article which appeared in last month's JAMA, it is apparent that the library is being treated as a cheap and convenient reprint service, and not as a library. It is felt NLM should not run a copying service *per se;* NLM must operate as a library, and all photocopying done should be an extension of normal library operations.

44. The Library of Congress operates a photoduplication service by which it provides photocopies of documents for a per-page fee. In 1965, electrostatic positive prints (Xerox) were provided at from 16 cents to 85 cents per sheet, depending on the quantity ordered and other factors. A brochure issued by the Library of Congress, effective October 1, 1965, stated in part:

> Photocopying is done by the Library under the following conditions:
>
> 1. The Library will generally make photoduplicates of materials in its collections available for research use. It performs such service for research, in lieu of loan of the material, or in place of manual transcription. Certain restricted material cannot be copied. The Library reserves the right to decline to make photoduplicates requested, to limit the number of copies made, or to furnish positive prints in lieu of negatives.

2. Copyright material will ordinarily not be copied without the signed authorization of the copyright owner. Exceptions to this rule may be made in particular cases. All responsibility for the use made of the photoduplicates is assumed by applicant.

There is no evidence to show the circumstances under which the Library of Congress makes "exceptions" to its rule against photocopying copyright materials.

45. The PRINTING MANAGEMENT MANUAL of defendant's Department of Health, Education, and Welfare (in effect in 1962 and 1967) stated as follows with respect to copyright:

* * * * * *

A. *General*

Material protected by copyright generally may not be reproduced in any fashion, including photocopying or similar techniques, without the express permission of the copyright proprietor. However, it has been the widespread practice of libraries to have single copies made of copyrighted articles to further scholarly research, without consent of the copyright proprietor. Therefore, Department libraries may make such single copies, but every precaution should be taken to assure that such single copying is done only at the written request of an employee to further scholarly research.

B. *Infringement*

1. Since the Government may be subject to claim or suit for damages, every precaution must be taken to avoid infringement of a copyright by an employee of the Department.
2. Employees should be advised that infringement of a copyright by an employee of the Department, not in the performance of his official duties may subject the employee to a suit for damages.

* * * * * *

RECOMMENDED CONCLUSION OF LAW

Upon the foregoing findings of fact and opinion which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover reasonable and entire compensation for infringement of copyright, and judgment is entered to that effect. The amount of recovery will be determined in further proceedings before a trial commissioner pursuant to Rule 131(c).

U.S. GOVERNMENT PRINTING OFFICE: 1978

STATEMENT REGARDING COURT OF CLAIMS JUDGMENT

The opinion and judgment of the United States Court of Claims (the judgment and decision in question) may be found in Petitioner's printed Appendix to the Petition for Certiorari, pages 1 through 104.

LIBRARY
SUPREME COURT, U. S.

FILED
FEB 20 1974
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,

Petitioner,

—against—

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
THE DECISION BELOW	5
REASONS FOR GRANTING THE WRIT	8
1. The Current Applicability of the "Fair Use" Doctrine and the Duty of the Court of Claims Under its Jurisdictional Statute are Important Questions for This Court	9
(a) The Copyright "Fair Use" Question	9
(b) The Jurisdictional "Reasonable Compensation" Question	11
2. The Important Questions Involved in This Case Press for Immediate Judicial Resolution	12
3. The Court Below Misconstrued Two Important Federal Statutes	15
(a) The Copyright Statute	15
(i) Misapplication of The Fair Use Doctrine	15
(ii) Conflict With Three Circuits and Need for Resolution by This Court	16
(b) The Jurisdictional Statute	17
CONCLUSION	18

TABLE OF AUTHORITIES

Page

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Fortnightly Corp. v. *United Artists Television, Inc.*, 392 U.S. 390 (1968)..... 14

Hedeman Products Corp. v. *Tap-Rite Products Corp.*, 228 F. Supp. 630 (D.N.J. 1964)..... 17

King Features Syndicate v. *Fleischer*, 299 Fed. 533 (2d Cir. 1924)..... 17

Markham v. *A. E. Borden Co.*, 206 F.2d 199 (1st Cir. 1953)..... 17

Perma Life Mufflers, Inc. v. *International Parts Corp.*, 392 U.S. 134 (1968)..... 18

Public Affairs Associates, Inc. v. *Rickover*, 284 F.2d 262 (D.C. Cir. 1960), *judgment vacated*, 369 U.S. 111 (1962)....16, 17

Teleprompter, Inc. v. *CBS, Inc.*, Nos. 72-1628, 72-1633..12, 14

U.S.A. v. *ASCAP*, CCH 1940-43 Trade Cases ¶56,104; 1950-51 id. ¶¶62,594, 62,595..... 14

Walt Disney Productions v. *Air Pirates*, 345 F. Supp. 108 (N.D. Cal. 1972)..... 16

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STATUTES:

17 U.S.C.
§1(a)....2, 5
§3....2, 17

28 U.S.C.
§1255(1)..... 2
§1498..... 14
§1498(b)....2, 3, 8, 11, 12

Page

CONGRESSIONAL REPORTS AND PRINTS:

H.R. REP. NO. 624, 86TH CONG., 2D SESS., 5 (1959) 12

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REGISTER OF COPYRIGHTS, 87TH CONG., 1ST SESS., REPORT ON THE GENERAL REVISION OF THE COPYRIGHT LAWS (Comm. Print 1961) 9

VARMER, "PHOTODUPLICATION OF COPYRIGHTED MATERIAL BY LIBRARIES," STUDY NO. 15, COPYRIGHT LAW REVISION STUDIES PREPARED FOR SENATE COMMITTEE ON THE JUDICIARY, 86TH CONG., 2D SESS. (Comm. Print 1960) 9

LAW REVIEWS:

41 U. CIN. L. REV. 511 (1972) 10

48 INDIANA L. J. 503 (1973) 10

14 NOTRE DAME LAWYER 443 (1939) 15

3 RUTGERS J. COMPUTERS & THE LAW 328 (1974) 10

51 TEXAS L. REV. 137 (1973) 10

25 VAND. L. REV. 1093 (1973) 10

12 WASHBURN L. J. 235 (1973) 10

13 WM. & MARY L. REV. 940 (1972) 10

PERIODICALS:

ADVERTISING AGE, Aug. 7, 1972, at 53 10

AMERICAN LIBRARIES, May, 1972, at 528 10

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Page

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MISCELLANEOUS:

THE BUREAU OF NAT'L AFFAIRS, 157 PATENT, TRADEMARK & COPYRIGHT JOURNAL, at D-4 (Dec. 13, 1973) 17

UNITED NATIONS EDUCATIONAL SCIENTIFIC & CULTURAL ORGANIZATION & WORLD INTELLECTUAL PROPERTY ORGANIZATION, "REPORT OF WORKING GROUP ON REPROGRAPHIC REPRODUCTION OF WORKS PROTECTED BY COPYRIGHT" at 5 (1973) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

THE WILLIAMS & WILKINS COMPANY,

Petitioner,

—against—

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in this case on November 27, 1973.

OPINIONS BELOW

The opinion of the Court of Claims Trial Judge was unofficially reported in the United States Patent Quarterly at 172 USPQ 670. The majority and dissenting opinions of the

Court of Claims (App.[1] 1 through 104) were reported at 487 F.2d 1345 and 180 USPQ 49.

JURISDICTION

The judgment of the Court of Claims was entered on November 27, 1973. The jurisdiction of this Court to review that judgment is invoked under 28 U.S.C. §1255(1).

QUESTION PRESENTED

Does systematic library reproduction of copyrighted journal articles in their entirety constitute "fair use" or copyright infringement?

STATUTES INVOLVED

28 U.S.C. §1498(b) provides in pertinent part as follows:

> "Hereafter, whenever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States***the exclusive remedy of the owner of such copyright shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation***."

* * *

Section 1(a) of the Copyright Law, 17 U.S.C. §1(a), provides as follows:

> "§1. EXCLUSIVE RIGHTS AS TO COPYRIGHTED WORKS. Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> a) To print, reprint, publish, copy, and vend the copyrighted work;"

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[1] Appendix hereto, which is being submitted to the Court separately pursuant to Rule 23(1)(i). References to numbers preceded by "Tr." are to the transcript of the trial.

Section 3 of the Copyright Law, 17 U.S.C. §3, provides in pertinent part as follows:

> "§3. PROTECTION OF COMPONENT PARTS OF WORK COPYRIGHTED; COMPOSITE WORKS OR PERIODICALS. The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted,***. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title."

STATEMENT OF THE CASE

This is an action seeking reasonable compensation from the Government for copyright infringement under 28 U.S.C. §1498(b). The principal defense in what the court below called this "ground-breaking" suit (App. 2) is that the Government's system of reproduction and distribution of journal articles constitutes "fair use." The Trial Judge found for petitioner on the issue of liability, with damages reserved for later determination. The Court of Claims, in a 4–3 decision, rejected its Trial Judge's decision and dismissed the petition.

The action is based on the reproduction of entire articles from petitioner's copyrighted journals by respondent through its National Institutes of Health ("NIH") and National Library of Medicine ("NLM"). The reproduction is performed through a comprehensive system whereby libraries, relying generally on one or two subscriptions to a journal, regularly fill all the requests of library users for journals of petitioner and other publishers by photocopying the requested journal articles. Under this system several million pages per year are copied.[2] Thus, respondent's photocopying is not

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[2] Respondent noted in 1966 its installation of 55,000 machines throughout the Government at a yearly cost of 80 million dollars (Finding 42(b)) and the serious effect of widespread copying on the sale of technical articles (Finding 42(c)) (App. 99).

casual or sporadic; its system is an integral part of NIH and NLM library operations.

Petitioner is a relatively small medical and scientific publisher whose journals are highly respected but have a limited number of subscriptions. Most of its journals are published in conjunction with nonprofit medical and scientific societies which receive from 50% to 90% of net profits, if any. Petitioner has established a licensing program to cover various uses of its journals, including licenses to libraries for photocopying.

Eight articles from four of petitioner's journals were among the many systematically copied by respondent. These articles were set forth in the petition in an effort to establish the rights of plaintiff and other copyright proprietors in this test case.

The NIH library photoduplication service employs Xerox copying machines and microfilm cameras from which copies are printed to provide journal articles, on a no-return basis, to any of the 12,000 employees at NIH. NLM is a library furnishing material generally to a network of other libraries and to other institutions, including commercial enterprises such as drug companies. In the case of journals, NLM (rather than the user) has decided to furnish reproductions of desired articles, also on a permanent basis, instead of lending the original. NLM's photocopying service is enhanced by its publication and sale of a current index of medical literature, which catalogs citations to journals of petitioner and other publishers and "thus advertises to the medical and scientific community which constitutes plaintiff's market, that certain articles are available free of charge in the form of a photocopy." (App. 41).

Respondent's system makes and distributes several hundred thousand reproductions of articles a year. Despite its purported self-limitations (established by reason, *inter alia*, of the danger of infringing copyrights) the system permits, and inevitably results in, repeated reproduction of the same articles.

In performing its photocopying, respondent leases its copying machines from Xerox Corporation, which it pays according to the number of pages reproduced.

This suit for reasonable compensation was not brought to halt or limit photocopying. It was undertaken to broaden the financial support available to privately published,[3] limited circulation, scientific journals whose survival is vital to the growth of scientific knowledge.

THE DECISION BELOW

All three opinions below recognized this case as requiring a landmark decision on the copyright doctrine of "fair use." The majority concluded that "on this record, the challenged use should be designated 'fair' and not 'unfair.' "[4] (App. 14). The "core" of the court's rationale was that: (1) petitioner (together with "medical publishers generally" (App. 23)) is not substantially harmed from the specific practices in question; (2) medicine and medical research would be injured by holding these particular practices to be an infringement; and (3) the problem of accommodating the competing interests calls for legislative action and until such action, the court should not place a risk of harm on science (App. 14). It is this last theme on which the court closes its opinion with the hope that "the result in the present case will be but a 'holding operation' in the interim period before Congress enacts its preferred solution."[5] (App. 29)

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[3] The Trial Judge noted that alternatives to private publication would be either no publication or publication by the Government, with its attendant problems, including the danger of censorship. 172 USPQ at 676, n. 7.

[4] In reaching this conclusion, the majority expressed "grave uncertainty" that the photocopying of journal articles (or any reproduction of periodicals or books) was covered by the word "copy" as one of the exclusive rights granted in Section 1(a) of the 1909 Copyright Act, 17 U.S.C. §1(a) (App. 9, 23). The Court took this "solid doubt . . . into account" (App. 9) in dismissing the petition.

[5] The most recent effort to revise the governing 1909 statute commenced with a study program in 1955. This led to the introduction of a bill in 1964 and its passage by the House of Representatives, but not the Senate, in 1967. (cont.)

Three of the seven judges dissented. Chief Judge Cowen's dissenting opinion pointed out the following:

(1) Upon analysis of the 1909 Act, its legislative history and subsequent judicial interpretation, photocopying of journal articles is indeed "copying," *i.e.*, "Congress obliterated the distinction, if there ever had been one, between the copying of books and the copying of other materials." (App. 32).

(2) Fair use is inapplicable because of the rule that wholesale copying of the kind here involved "without more defeats the defense of fair use."[6] (App. 35).

(3) The latitude fair use affords science and scholarly works applies to a new author's need to comment on and discuss earlier works in the same field, and has no application to the bare verbatim reproduction here involved. (App. 35, 36).

(4) The so-called "single-copy-per-request" limitation of respondent is illusory and unrealistic because furnishing each of ten patrons with one copy of the same article is no different from giving ten copies to one patron. (App. 34).

(5) There is legally cognizable harm to petitioner resulting from respondent's operation of "a reprint service which supplants the need for journal subscriptions"

No further progress on general revision has been made in the House. The Senate Judiciary Subcommittee on Patents, Trademarks and Copyrights held hearings in July, 1973 but as of this writing no report has yet been issued. A dispassionate view of this 19-year effort precludes any assumptions as to whether, or when, a new law will be passed. Accordingly, the majority's attempt to decide the present case as a "holding operation" is, as pointed out at pages 13–15, *infra*, most inappropriate.

[6] The opinion notes that the majority cites no decision in support of its rejection of the above rule (App. 35). The conflict created by the Court of Claims' decision on this point with those of the Ninth, District of Columbia and Eighth Circuits is discussed below at pages 16–17.

(App. 34) and operates "on a scale so vast that it dwarfs the output of many small companies." (App. 31, 37–42).[7]

(6) The award of reasonable compensation to petitioner in this case will not injure medical research. (App. 43–44).[8]

Judge Nichols, joining in Chief Judge Cowen's dissent, also wrote a separate opinion emphasizing that the question before the court is not whether photocopying should be stopped since curtailment of photocopying could in no event be the result of any decision by the Court of Claims. (App. 67). The opinion points out that "however hedged, the [majority] decision will

[7] The narrow subscription base and high preparation costs of scholarly journals make the loss of even a single subscription important (App. 55). Petitioner's income from permissions and licensing of microfilms, reprints and photocopying is also important. Though the sums may seem small, they are significant in financing journals, and will become more so in the future.

Petitioner's blanket licensing system referred to by the majority (App. 24) would cost libraries supplying only their own patrons with photocopies, such as NIH, an average of $3.65 per year for each of petitioner's journals, payable along with the subscriptions. Regional libraries making reproductions for other libraries and NLM, at the apex of a massive national network, would pay proportionally more. These sums may properly be described as "a surprisingly small sum" (App. 43) from the point of view of a particular library, but they are crucial in the aggregate to a publisher trying to keep scientific journals viable.

[8] The record contains the admission on behalf of respondent that the payment of royalties to publishers for obtaining photocopies would not hinder the performance of the NIH library since this is merely "a side issue" involving economic and budgetary considerations. (Tr. 174-75).

Medical research, rather than being harmed, would be benefited by reasonable compensation. This is because: (a) publication of research results is a "vital part of research" (Finding 13, App. 79); and (b) uncompensated photocopying leads to "a vicious cycle which can only bode ill for medical publishing." (Trial Judge's opinion incorporated in Chief Judge Cowen's dissent at App. 55. See Tr. 436; 986-87; 1301-02).

The fallacy of the majority is demonstrated by simply considering the self-restraint of respondent and other libraries with respect to copying as much as a chapter from a book or "monograph" [a librarian's sometimes hazy distinction from a journal]. (Finding 18). Respondent's libraries have functioned and medical research has apparently proceeded apace despite the fact that libraries do not photocopy in this area without permission.

be read that a copyright holder has no rights a library is bound to respect. We are making the Dred Scott decision of copyright law." (App. 69).

REASONS FOR GRANTING THE WRIT

Despite the close division on the merits in the court below, all three opinions confirm that this case poses an important but undecided legal question concerning "fair use" of copyrighted works. In reaching and determining this issue, the Court of Claims departed from a fundamental rule of law in such manner as to create a sharp conflict with three Courts of Appeals. In so doing, the court has not only committed basic errors in copyright law but has also ignored its function under the jurisdictional statute, 28 U.S.C. 1498(b). Thus, the court below has misconstrued two important federal statutes.

The parties and their *amici curiae* below all agreed that these legal issues have immediate and substantial ramifications in the field of scientific research and communications far beyond the present litigants. The case thus involves application of established doctrines of copyright law to contemporary versions of information dissemination. Finally, this case presents these questions in a particularly appropriate context, with focus upon the relationship between Government and the individual, *i.e.*, the reasonable compensation, if any, to be awarded for Government use through modern technology of privately copyrighted material.

We urge that any one of these factors would justify the granting of certiorari; in combination, we respectfully submit that the granting of the writ is essential.

The sweep of the decision below has been carefully understated by the majority. The records of photoduplication necessarily maintained and disclosed by the Government have provided particularly complete documentation in this record as to how library photocopying actually operates. This record reveals a comprehensive systematic operation, which includes a network of libraries throughout the country being

serviced by NLM. Under these facts, the reference in the majority opinion to its "being stingy rather than expansive in the reach of our holding" (App. 29) is, we submit, misdescriptive. The holding is necessarily expansive because it excuses a massive system of photoduplication—and of necessity all lesser photocopying activities—as "fair use." There are no limiting factors in this situation which would not be applicable in other situations. Accordingly, this case will simply be read, as noted by Judge Nichols, to "encourage unrestricted piracy." (App. 69).

1. The Current Applicability of The "Fair Use" Doctrine And The Duty of The Court of Claims Under Its Jurisdictional Statute Are Important Questions For This Court.

(a) *The Copyright "Fair Use" Question.* Resolution of the copyright issue here being tested has been long anticipated by scholars, administrative officials, legislators and the publishing and library communities. A definitive study of the subject observed that "unfortunately, there are no decisions dealing specifically with photocopying by libraries, or even with the narrower question of a person making photocopies for his own use." VARMER, "PHOTODUPLICATION OF COPYRIGHTED MATERIAL BY LIBRARIES" STUDY NO. 15, COPYRIGHT LAW REVISION STUDIES PREPARED FOR SENATE COMMITTEE ON THE JUDICIARY, 86TH CONG., 2D SESS. 50 (Comm. Print 1960). A director of NLM recognized that with respect to his library's photocopying activities "it is possible, if not probable, that the years would bring, sooner or later, a test of the issue in the courts." (Pltf. Ex. 38, p. 1375; Tr. 416). The Register of Copyrights similarly noted that this important question, which had not been decided by the courts, merits special consideration. See REGISTER OF COPYRIGHTS, 87TH CONG., 1ST SESS., REPORT ON THE GENERAL REVISION OF THE COPYRIGHT LAWS 25 (Comm. Print 1961).

It is thus not surprising that the majority opinion below called this case "a ground-breaking copyright infringement action" raising "troublesome problems" which "have never before been mooted or determined by a court." (App. 2). The

Trial Judge had stated that "this suit is one of first impression [and] raises long troublesome and much discussed issues. . . ." 172 USPQ at 672. The Trial Judge's opinion itself was the subject of at least seven law review comments[9] as well as innumerable reports in publishing, library and other industry media.[10] It received widespread international attention, including mention in a recent UNESCO document,[11] and was commented upon in some detail in TIME (May 1, 1973 at 62). In the short time since the Court of Claims' decision, its impact has been widely noted in the trade and popular press.[12]

The filing at the trial level of *amicus curiae* briefs was unusual and reflected the extraordinary consequences perceived by many affected groups.[13] The *amici* who have already appeared in this

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[9] 41 U. CIN. L. REV. 511 (1972); 48 INDIANA L.J. 503 (1973); 3 RUTGERS JOURNAL OF COMPUTERS & THE LAW 328 (1974); 51 TEXAS L. REV. 137 (1972); 25 VAND. L. REV 1093 (1972); 12 WASHBURN L.J. 235 (1973); 13 WM. & MARY L. REV. 940 (1972).

[10] E.g., PUBLISHER'S WEEKLY, Feb. 28, 1972 at 48 and 55; AMERICAN LIBRARIES, May, 1972 at 528; ADVERTISING AGE, August, 1972 at 53.

[11] UNITED NATIONS EDUCATIONAL SCIENTIFIC AND CULTURAL ORGANIZATION AND WORLD INTELLECTUAL PROPERTY ORGANIZATION, "REPORT OF WORKING GROUP ON REPROGRAPHIC REPRODUCTION OF WORKS PROTECTED BY COPYRIGHT" 5 (1973).

[12] PUBLISHERS WEEKLY, November 28, 1973, at 18; EDUCATION U.S.A. at 80 (December 3, 1973); WASHINGTON POST, November 28, 1973, at A24; MIAMI HERALD, November 29, 1973, at 20-A; LOS ANGELES TIMES, Jan. 27, 1974, Part VIII, at 1.

[13] At the Court of Claims level, five briefs *amicus curiae* were received in support of petitioner on behalf of: The Authors League of America, Inc., The American Chemical Society, The American Institute of Physics Incorporated, Association of American Publishers, Inc., The Association of American University Presses, Incorporated, American Society for Testing and Materials and National Council of Teachers of Mathematics.

Three briefs *amicus curiae* were received in support of respondent on behalf of: Association of Research Libraries, Medical Library Association, American Association of Law Libraries, American Medical Association, American Dental Association, Mayo Foundation, Robert H. Ebert, M.D. (in his capacity as Dean of the Faculty of Medicine, Harvard University), The University of Michigan Medical School, The University of Rochester, School

case themselves represent thousands and in one case millions of members. Each has in its brief below set forth in detail the respects in which the decision in this case will affect their members and the public at large. For example, the Authors League of America has indicated that it supports this action by a publisher because the principle involved not only affects authors through direct loss of income, but also "an even more drastic injury—the ultimate discontinuance of a periodical, journal or publishing house." (Brief *Amicus Curiae* of the Authors League of America, Inc., p. 3). Similarly, the Association of American Publishers and The Association of American University Presses have stated that their memberships, "non-profit and for profit alike, have a vital interest in the library photocopying issues presented in this case." (Brief *Amicus Curiae* of the Association of American Publishers, Inc. and The Association of American University Presses, Incorporated, p. 2).

This recognition of far-reaching implications is by no means restricted to the *amici* who have supported petitioner in the court below. For example, The American Library Association, in discussing the question presented by this case emphasized that "a decision would constitute precedent whose potential effect transcends the interests of the instant litigants." (Brief *Amicus Curiae* of the American Library Association, p. 2).

In view of these facts and the uncertainty engendered by the division in the court below, it is submitted that a prompt authoritative resolution by this Court of the copyright issue here involved is amply warranted.

(b) *The Jurisdictional "Reasonable Compensation" Question.* This action was commenced eight years after the enactment in 1960 of 28 U.S.C. §1498(b), the jurisdictional statute permitting suits against the Government for copyright infringement exclusively by action for damages in the Court of Claims. This is

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of Medicine and Dentistry, American Sociological Association, Modern Language Association of America, History of Science Society, The National Education Association of the United States, and American Library Association.

the first such suit reaching decision and thus presents the first opportunity to define the duty of the Court of Claims under such statute. This is entirely appropriate because Congress, in passing this statute, was specifically asked by the Government to cover, among other things, the "ever-increasing danger" of infringement through photocopying machines. H.R. REP. NO. 624, 86TH CONG., 2D SESS. 5 (1959).

In a striking departure from its established approach in patent and indeed other "taking" cases, the court ignored the task before it and denied reasonable compensation on the basis of its thoughts on what other courts might do in other cases. That the fears of the majority in this regard are groundless is demonstrated by Judge Nichols in his dissenting opinion and at page 18, *infra*. But aside from this, plaintiff sued in the Court of Claims because of activities by the Government, not by private persons. It does not seek an injunction which, of course, is specifically unavailable under 28 U.S.C. §1498(b). It does seek reasonable compensation from those who use its journals through large scale photocopying. This would supplement the income derived from those who use the journals by becoming subscribers, the objective being to gain broader based support for the ever increasing costs of publishing scholarly journals. The court's refusal to grant reasonable compensation here is unjustified and deprives plaintiff and parties similarly situated of their only possible forum the first time this remedy is sought. The only appellate procedure available in this situation is by way of certiorari, which is sought by this petition.

2. The Important Questions Involved In This Case Press For Immediate Judicial Resolution.

This lawsuit was commenced in February, 1968. During these six years it has become evident that the technology of photoduplication—a form of printing from which one or a thousand copies can be made with the turn of a dial—poses problems ripe for solution. The presence of problems of this type is confirmed by the cable antenna television issues raised in *Tele-*

prompter, Inc. v. CBS, Inc., Nos. 72–1628, 72–1633, which was argued before this Court in January, 1974. We are now at the point where, as conceded by the majority below, "the proliferation of inexpensive and improved copying machines, less than two decades ago, led to the surge in such duplication." (App. 18).

It is also submitted that courts, such as the Court of Claims, can and must face the task of applying the judge-made rules governing fair use cases such as this, without waiting for Congressional action.

We have noted the hope expressed by the majority below that "the result in the present case will be but a 'holding action' in the interim period before Congress enacts its preferred solution." (App. 29). But Congress has shown a distinct disinclination to act in this area in the absence of substantial agreement among the parties concerned. And the decision reached by the majority below, if adhered to, will merely reinforce adamance on the part of librarians[14] which will block any voluntary arrangement or satisfactory congressional compromise.

The "holding operation" philosophy also places this pressing problem in an "Alfonse & Gaston" posture. To emphasize the need for congressional treatment is one thing; to postulate a decision on this basis, even in part, is, it is submitted, virtually an abdication of the judicial function. Moreover, this approach conflicts directly with the legislative exhortation by the House Judiciary Committee that the "courts must be free to adapt the [fair use] doctrine to particular situations on a case-by-case basis;" for this reason the Committee (and presumably the House of Representatives in passing a bill in 1967) had "no

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[14] An objective of the present lawsuit was to achieve legal recognition by librarians of the rights of copyright proprietors so that dialogue would be possible with the objective of reasonable accommodation. The clock has now been turned back in this respect to 1967 when the Director of NLM refused to consider any plan of payment to publishers until ordered to do so by a court (Tr. 75).

disposition to freeze the doctrine in the statute, especially during a period of technological change." H.R. REP. No. 83, 90TH CONG., 1ST SESS., 29 (1967). The majority quotes and then ignores this precise language in its opinion. (App. 26, n. 28). Plaintiff, and authors and publishers generally, are thus caught in a never-ending "holding operation" devised by the majority of the Court of Claims, unless and until this Court speaks.

The Solicitor General, as *amicus*, supported the grant of certiorari in the *Teleprompter* case, *supra*, because "it is uncertain when or whether copyright revision legislation will be forthcoming." (Memorandum, p. 2). The corollary is that courts must act, not as managers of an illusory "holding operation," but as adjudicators of existing rights. This is entirely appropriate in the context of the present case in which the compulsory license approach of 28 U.S.C. §1498 offers a unique opportunity to insure continuation of photocopying with a court setting compensation that is reasonable under the circumstances.[15] The result could serve as a model for other publishers and other libraries.

The fact that existing judicial procedures for copyright ratemaking may be under the antitrust laws is of no moment; the systems have worked reasonably well.[16] Both the Court of Claims and other courts have the necessary powers under the copyright law to deny injunctions and award reasonable com-

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[15] The case thus presents the very vehicle which was unavailable to this Court in *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968), the forerunner of *Teleprompter* on the question whether cable television "performs" copyrighted works. The Solicitor General had there suggested that the Court render a compromise decision accommodating various competing considerations; the Court declined the suggestion, noting that such job was for Congress. 392 U.S. at 401. But in 1960 Congress, with full awareness of the risks of liability through photocopying, granted the Court of Claims the power to consider all factors in each case to arrive at reasonable compensation in concrete situations of copyright infringement by Goverment agencies.

[16] Judicial rate-making for copyright royalties is employed in the consent decree governing the American Society of Composers, Authors and Publishers. See, e. g., U.S.A. v. ASCAP, CCH 1940-43 Trade Cases ¶ 56,104; 1950-51 id. ¶¶ 62,594, 62,595.

pensation in this situation. If the decision below stands, however, this power will never be utilized.

3. The Court Below Misconstrued Two Important Federal Statutes.

(a) *The Copyright Statute.*

(i) *Misapplication of The Fair Use Doctrine.* The court below purported to decide this case on the judge-made doctrine of "fair use".[17] Since the key question in most copyright cases is whether the nature and amount of copying amounts to infringement, this doctrine has been aptly described as simply an attempt by the courts "to bring some order out of the confusion surrounding the question of how much can be copied." Note, 14 NOTRE DAME LAWYER 443, 449 (1939). The doctrine is not, as intimated throughout the majority's opinion, simply a subjective measure of a court's moralistic view as to whether a copying is "fair" or "unfair." The majority sets forth a set of distilled criteria in its opinion (App. 12) and then proceeds to ignore them in a complete departure from recognized principles of fair use. After expressing the doubt noted above that "copying" means "copying", the court proceeds to base its decision on eight factors. These begin with emphasis on the nonprofit nature of NIH and NLM. But it is clear, as noted by Chief Judge Cowen (App. 36), that virtually every use by the Government is in fact nonprofit;[18] if this factor were to be determinative, or even significant, there would be no cases possible against the Government for copyright infringement. Yet, as

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[17] The court assumed arguendo that petitioner was the proper party to sue, a point controverted by respondent below. Respondent did not press before the court below other defenses which had been raised at the trial including a license defense arising from certain Public Health Service grants because "these defenses have a limited impact." (Defendant's Brief, p. 9). These defenses are in fact completely inapplicable to certain counts in the petition herein and, accordingly, their determination either way would not avoid the necessity of resolving the fair use question which dominates this case.

[18] Of course, the medical societies for whom plaintiff publishes journals are nonprofit as well.

noted above, infringement by photocopying was one of the specific instances for which liability was provided in 1960. The majority's eight factors end with reliance on foreign statutes. Aside from substantial questions as to whether these statutes would actually excuse the activities here involved, the statutes merely illustrate that: (a) when a special exemption from the normal liability of the copyright law is desired, a statute is required and (b) the copyright laws of foreign countries are, as is well known, markedly different from United States law in a number of respects.[19]

(ii) *Conflict with Three Circuits and Need for Resolution by this Court.* It is not surprising that in ignoring established fair use criteria, the majority below was forced to depart from a significant and established rule of law. It has been explicitly recognized in the Ninth Circuit,[20] the District of Columbia Circuit[21] and the Eighth Circuit[22] that the doctrine of fair use is completely inapplicable to the copying of entire works. The Court of Claims rejected this proposition in the course of making its determination and could not have reached its result without doing so.[23]

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[19] The majority goes far afield in time as well as place. In denying compensation in 1973, the Court below relies on alleged practices in 1935 or even earlier. These are completely irrelevant by reason of respondent's concession in its brief below (page 46) that as late as 1958 "there was virtually no photocopying as presently practiced."

[20] *Benny* v. *Loew's, Inc.*, 239 F.2d. 532 (9th Cir. 1956), *aff'd by an equally divided Court*, 356 U.S. 43 (1958). (Parody not automatically fair use since "there is only a single decisive point in the case: one cannot copy the substance of another's work without infringing his copyright" 239 F.2d at 537). The *Benny* case is currently applied as law within the Ninth Circuit. See *Walt Disney Productions* v. *Air Pirates*, 345 F. Supp. 108 (N.D. Cal. 1972).

[21] *Public Affairs Associates, Inc.* v. *Rickover*, 284 F.2d 262 (D.C. Cir. 1960), *judgment vacated*, 369 U.S. 111 (1962). (Where verbatim copies of speeches are taken, the possibility of the defense of fair use can be ruled out at the threshold).

[22] *Wihtol* v. *Crow*, 309 F.2d 777 (8th Cir. 1962). (Educational nonprofit arrangement of musical work by high school choral instructor held infringement and not fair use because defendant had copied "all or substantially all of a copyrighted song").

[23] This is because the court agreed with petitioner that each article must be

The error in both result and approach by the majority below results in part, we submit, from the absence of any controlling pronouncement on fair use thus far by this Court, the only reviewing authority of the Court of Claims. Both the *Benny* and *Rickover* cases (notes 20 and 21, *supra*) reached this Court but without producing any opinion of the Court on this issue.

(b) *The Jurisdictional Statute.* Congress provided for copyright compensation as a companion sub-section to the long-established provision covering Government liability for patent infringement. The operation of the two remedies is similar. The Department of Justice accurately described this patent provision recently as follows:

> "Under this provision, a patentee has no right to exclude or secure an injunction against such use; there is automatically a mandatory license to the government and its contractors. The patentee has a claim for just compensation, however, which may be brought before the Court of Claims.*** The original reason for this statute, and one that retains vitality today, is that *the government retains the right to undertake and carry out work involving the national defense and security, or other such public necessities, without being blocked from doing so by the patent system, although it should pay reasonable compensation for the use of the patented invention.*" [Emphasis supplied] THE BUREAU OF NAT'L AFFAIRS, 157 PATENT, TRADEMARK & COPYRIGHT JOURNAL, AT D-4 (Dec. 13, 1973).

As recognized by Congress, the Government in both patent and copyright situations must have the right to use the pro-

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considered a separate work (App. 7, n. 6); therefore, copying an entire article is copying an entire work. This is explicitly required by Section 3 of the statute which provides that "the copyright upon . . . periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title." 17 U.S.C. §3. See *Markham* v. *A. E. Borden Co.*, 206 F.2d 199 (1st Cir. 1953); *King Features Syndicate* v. *Fleischer*, 299 Fed. 533 (2d Cir. 1924); *Hedeman Products Corp.* v. *Tap-Rite Products Corp.*, 228 F. Supp 630, 633 (D.N.J. 1964).

tected work, subject only to the requirement that it pay the proprietor a reasonable compensation. Petitioner submits that the complete disregard of this approach by the majority of the Court of Claims in its first determination under the 1960 copyright reasonable compensation statute frustrates the legislative purpose.[24] For example, one of the three "core" propositions of the Court's opinion is that medical research would be injured by finding for petitioner. Reasonable compensation could not possibly have such a result, any more than reasonable compensation for the Defense Department's use of an invention would harm national defense.

The Court presumably fears that a decision in plaintiff's favor might be a precedent in cases between private parties where injunctions are potentially available. But as demonstrated by Judge Nichols in his dissenting opinion, courts may equitably withhold injunctions and determine compensation which is reasonable under the circumstances. This is a most likely result since neither the vast number of publishers represented by the *amici curiae* nor any other publisher has ever expressed any interest in an injunction against library photoduplication. Alternatively, fair use might well be found if a proprietor refused to license on reasonable terms. The court was in error here by completely ignoring petitioner's licensing program, which permits and indeed encourages photocopying simply upon payment of a modest annual sum constituting reasonable compensation.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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Of Counsel

[24] Cf. *Perma Life Mufflers* v. *International Parts Corp.*, 392 U.S. 134, 136 (1968) (Certiorari granted because lower court approach "seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States.").

LIBRARY
SUPREME COURT, U. S.

FEB 20 1974

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,

Petitioner,

—against—

THE UNITED STATES,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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In the United States Court of Claims

No. 73-68

(Decided November 27, 1973)

THE WILLIAMS & WILKINS COMPANY v. THE UNITED STATES

Alan Latman, attorney of record, for plaintiff. *Arthur J. Greenbaum* and *Cowan, Liebowitz & Latman*, of counsel.

Thomas J. Byrnes, with whom was *Assistant Attorney General Harlington Wood, Jr.*, for defendant.

Irwin Karp, for The Authors League of America, Inc., amicus curiae.

Philip B. Brown, for the Association of Research Libraries, Medical Library Association, American Association of Law Libraries, American Medical Association, American Dental Association, Mayo Foundation, Robert H. Ebert, M.D. (in his capacity as Dean of the Faculty of Medicine, Harvard University), The University of Michigan Medical School, The University of Rochester, School of Medicine and Dentistry, American Sociological Association, Modern Language Association of America, and History of Science Society, amici curiae. *Cox, Langford & Brown* and *John P. Furman*, of counsel.

Harry N. Rosenfield, for The National Education Association of the United States, amicus curiae.

William D. North, for the American Library Association, amicus curiae. *Perry S. Patterson*, *Ronald L. Engel*, *James M. Amend*, *John A. Waters*, *Thomas B. Carr*, and *Kirkland & Ellis*, of counsel.

Charles H. Lieb, for the Association of American Publishers, Inc. and The Association of American University

525-615—73

Presses, Incorporated, amici curiae. *Paskus, Gordon & Hyman*, and *Elizabeth Barad*, of counsel.

Arthur B. Hanson, for The American Chemical Society, amicus curiae. *Hanson, O'Brien, Birney, Stickle & Butler*, of counsel.

Davies, Hardy, Ives & Lawther, for The American Institute of Physics Incorporated, amicus curiae. *Robert E. Lawther*, of counsel.

Robert B. Washburn, Virgil E. Woodcock, and *Woodcock, Washburn, Kurtz & Mackiewicz*, for American Society for Testing and Materials and National Council of Teachers of Mathematics, amici curiae.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, *Judges*.

OPINION

DAVIS, *Judge*, delivered the opinion of the court:

We confront a ground-breaking copyright infringement action under 28 U.S.C. § 1498(b), the statute consenting to infringement suits against the United States.[1] Plaintiff Williams & Wilkins Company, a medical publisher, charges that the Department of Health, Education, and Welfare, through the National Institutes of Health (NIH) and the National Library of Medicine (NLM), has infringed plaintiff's copyrights in certain of its medical journals by making unauthorized photocopies of articles from those periodicals. Modern photocopying in its relation to copyright spins off troublesome problems, which have been much discussed.[2] Those issues have never before been mooted or determined by a court. In this case, an extensive trial was held before former Trial Judge James F. Davis who decided that the Government was liable for infringement. On review, helped by the briefs and agreements of the parties and the amici curiae,

[1] Prior to 1960, § 1498 provided only for patent infringement suits against the Federal Government. In that year, Congress amended the section to make the United States liable in money for copyrighted infringement, pursuant to Title 17 of the United States Code, the general copyright statute. This is the first copyright case to reach trial in this court.

[2] We list in the Appendix, *infra*, several considerations to these problems.

we take the other position and hold the United States free of liability in the particular situation presented by this record.

I [3]

Plaintiff, though a relatively small company, is a major publisher of medical journals and books. It publishes 37 journals, dealing with various medical specialties. The four journals in suit are *Medicine*, *Journal of Immunology*, *Gastroenterology*, and *Pharmacological Reviews*. *Medicine* is published by plaintiff for profit and for its own benefit. The other three journals are published in conjunction with specialty medical societies which, by contract, share the journals' profits with plaintiff. The articles published in the journals stem from manuscripts submitted to plaintiff (or one of the medical societies) by physicians or other scientists engaged in medical research. The journals are widely disseminated throughout the United States (and the world) in libraries, schools, physicians' offices, and the like. Annual subscription prices range from about $12 to $44; and, due to the esoteric nature of the journals' subject matter, the number of annual subscriptions is relatively small, ranging from about 3,100 (*Pharmacological Reviews*) to about 7,000 (*Gastroenterology*). Most of the revenue derived from the journals comes from subscription sales, though a small part comes from advertising.[4] The journals are published with notice of copyright in plaintiff's name. The notice appears at the front of the journal and sometimes at the beginning of each article. After publication of each journal issue (usually monthly or bimonthly) and after compliance with the requisite statutory requirements, the Register of Copyrights issues to plaintiff certificates of copyright registration.

NIH, the Government's principal medical research organization, is a conglomerate of institutes located on a multi-acre campus at Bethesda, Maryland. Each institute is concerned with a particular medical specialty, and the insti-

[3] We borrow, with some modifications, the statement of facts from the opinion of Trial Judge James F. Davis.

[4] *E.g.*, the November 1956 issue of *Medicine* has 86 pages, four of which carry commercial product advertising. The August 1965 issue of *Journal of Immunology* has 206 pages, nine of which carry commercial product advertising.

tutes conduct their activities by way of both intramural research and grants-in-aid to private individuals and organizations. NIH employs over 12,000 persons—4,000 are science professionals and 2,000 have doctoral degrees. To assist its intramural programs, NIH maintains a technical library. The library houses about 150,000 volumes, of which about 30,000 are books and the balance scientific (principally medical) journals. The library is open to the public, but is used mostly by NIH in-house research personnel. The library's budget for 1970 was $1.1 million; of this about $85,000 was for the purchase of journal materials.

The NIH library subscribes to about 3,000 different journal titles, four of which are the journals in suit. The library subscribes to two copies of each of the journals involved. As a general rule, one copy stays in the library reading room and the other copy circulates among interested NIH personnel. Demand by NIH research workers for access to plaintiff's journals (as well as other journals to which the library subscribes) is usually not met by in-house subscription copies. Consequently, as an integral part of its operation, the library runs a photocopy service for the benefit of its research staff. On request, a researcher can obtain a photocopy of an article from any of the journals in the library's collection. Usually, researchers request photocopies of articles to assist them in their on-going projects; sometimes photocopies are requested simply for background reading. The library does not monitor the reason for requests or the use to which the photocopies are put. The photocopies are not returned to the library; and the record shows that, in most instances, researchers keep them in their private files for future reference.

The library's policy is that, as a rule, only a single copy of a journal article will be made per request and each request is limited to about 40 to 50 pages, though exceptions may be, and have been, made in the case of long articles, upon approval of the Assistant Chief of the library branch. Also, as a general rule, requests for photocopying are limited to only a single article from a journal issue. Exceptions to this rule are routinely made, so long as substantially less than an entire journal is photocopied, *i.e.*, less than about half of the journal. Coworkers can, and frequently do, request single copies of the same article and such requests are honored.

Four regularly assigned employees operate the NIH photocopy equipment. The equipment consists of microfilm cameras and Xerox copying machines. In 1970, the library photocopy budget was $86,000 and the library filled 85,744 requests for photocopies of journal articles (including plaintiff's journals), constituting about 930,000 pages. On the average, a journal article is 10 pages long, so that, in 1970, the library made about 93,000 photocopies of articles.

NLM, located on the Bethesda campus of NIH, was formerly the Armed Forces Medical Library. In 1956, Congress transferred the library from the Department of Defense to the Public Health Service (renaming it the National Library of Medicine), and declared its purpose to be "* * * to aid the dissemination and exchange of scientific and other information important to the progress of medicine and to the public health * * *." 42 U.S.C. § 275 (1970). NLM is a repository of much of the world's medical literature, in essence a "librarians' library." As part of its operation, NLM cooperates with other libraries and like research-and-education-oriented institutions (both public and private) in a so-called "interlibrary loan" program. Upon request, NLM will loan to such institutions, for a limited time, books and other materials in its collection. In the case of journals, the "loans" usually take the form of photocopies of journal articles which are supplied by NLM free of charge and on a no-return basis. NLM's "loan" policies are fashioned after the General Interlibrary Loan Code, which is a statement of self-imposed regulations to be followed by all libraries which cooperate in interlibrary loaning. The Code provides that each library, upon request for a loan of materials, shall decide whether to loan the original or provide a photoduplicate. The Code notes that photoduplication of copyrighted materials may raise copyright infringement problems, particularly with regard to "photographing *whole issues* of periodicals or books with *current copyrights*, or in making *multiple copies* of a publication." [Emphasis in original text.] NLM, therefore, will provide only one photocopy of a particular article, per request, and will not photocopy on any given request an entire journal issue. Each photocopy

reproduced by NLM contains a statement in the margin, "This is a single photostatic copy made by the National Library of Medicine for purposes of study or research in lieu of lending the original."

In recent years NLM's stated policy has been not to fill requests for copies of articles from any of 104 journals which are included in a so-called "widely-available list." Rather, the requester is furnished a copy of the "widely-available list" and the names of the regional medical libraries which are presumed to have the journals listed. Exceptions are sometimes made to the policy, particularly if the requester has been unsuccessful in obtaining the journal elsewhere. The four journals involved in this suit are listed on the "widely-available list." A rejection on the basis of the "widely-available list" is made only if the article requested was published during the preceding 5 years, but requests from Government libraries are not refused on the basis of the "widely-available list."

Also, NLM's policy is not to honor an excessive number of requests from an individual or an institution. As a general rule, not more than 20 requests from an individual, or not more than 30 requests from an institution, within a month, will be honored. In 1968, NLM adopted the policy that no more than one article from a single journal issue, or three from a journal volume, would be copied. Prior to 1968, NLM had no express policy on copying limitations, but endeavored to prevent "excessive copying." Generally, requests for more than 50 pages of material will not be honored, though exceptions are sometimes made, particularly for Government institutions. Requests for more than one copy of a journal article are rejected, without exception. If NLM receives a request for more than one copy, a single copy will be furnished and the requester advised that it is NLM's policy to furnish only one copy.

In 1968, a representative year, NLM received about 127,000 requests for interlibrary loans. Requests were received, for the most part, from other libraries or Government agencies. However, about 12 percent of the requests came from private or commercial organizations, particularly drug companies. Some requests were for books, in which event the book itself was loaned. Most requests were for journals or journal arti-

cles; and about 120,000 of the requests were filled by photocopying single articles from journals, including plaintiff's journals. Usually, the library seeking an interlibrary loan from NLM did so at the request of one of its patrons. If the "loan" was made by photocopy, the photocopy was given to the patron who was free to dispose of it as he wished. NLM made no effort to find out the ultimate use to which the photocopies were put; and there is no evidence that borrowing libraries kept the "loan" photocopies in their permanent collections for use by other patrons.

Defendant concedes that, within the pertinent accounting period, NLM and the NIH library made at least one photocopy of each of eight articles (designated by plaintiff as the Count I-to-Count VIII articles) from one or more of the four journals in suit. These requests, as shown at the trial, were made by NIH researchers and an Army medical officer (stationed in Japan) in connection with their professional work and were used solely for those purposes. In seven of the eight counts in the petition, the article requested was more than two years old; in the eighth instance it was 21 or 22 months old.

II

We assume, for the purposes of the case, but without deciding, that plaintiff is the proper copyright owner and entitled to sue here,[5] and we agree with plaintiff that, on that assumption, it can sue for infringement of the eight separate articles.[6] This faces us squarely with the issue of infringement.

Perhaps the main reason why determination of the question is so difficult is that the text of the Copyright Act of 1909, which governs the case, does not supply, by itself, a

[5] Defendant vigorously contests the publisher's claim to be the copyright "proprietor" and its right to sue in this court. The argument is that the individual authors of the articles are the owners and they have not assigned their rights to plaintiff.

[6] Section 3 of the copyright statute, 17 U.S.C. § 3, says that, "• • • [t]he copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title." This means, and was intended to provide, that each article in the journals is protected from infringement to the same extent as the entire issue. *Advertisers Exch., Inc.* v. *Laufe*, 29 F. Supp. 1 (W.D. Pa. 1939); *King Features Syndicate* v. *Fleischer*, 299 F. 533 (C.A. 2, 1924).

clear or satisfactory answer. Section 1 of the Act, 17 U.S.C. § 1, declares that the copyright owner "shall have the exclusive right: (a) To print, reprint, publish, copy, and vend the copyrighted work; * * *." Read with blinders, this language might seem on its surface to be all-comprehensive—especially the term "copy"—but we are convinced, for several reasons, that "copy" is not to be taken in its full literal sweep. In this instance, as in so many others in copyright, "[T]he statute is hardly unambiguous * * * and presents problems of interpretation not solved by literal application of words as they are 'normally' used * * *." *DeSylva* v. *Ballentine*, 351 U.S. 570, 573 (1956). *See, also, Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390, 395–96 (1968).

The court-created doctrine of "fair use" (discussed in Part III, *infra*) is alone enough to demonstrate that Section 1 does not cover all copying (in the literal sense). Some forms of copying, at the very least of portions of a work, are universally deemed immune from liability, although the very words are reproduced in more than *de minimis* quantity. Furthermore, it is almost unanimously accepted that a scholar can make a handwritten copy of an entire copyrighted article for his own use, and in the era before photoduplication it was not uncommon (and not seriously questioned) that he could have his secretary make a typed copy for his personal use and files. These customary facts of copyright-life are among our givens. The issue we now have is the complex one of whether photocopying, in the form done by NIH and NLM, should be accorded the same treatment—not the ministerial lexicographic task of deciding that photoduplication necessarily involves "copying" (as of course it does in dictionary terms).

One aspect of the history and structure of the 1909 Act offers another reason for refusing to give "copying" in Section 1, as applied to these articles, its simplest "ordinary" reach. It is pointed out to us, on the basis of analysis of the copyright laws from 1790 to 1909,[7] that the early statutes

[7] Congress enacted the first copyright statute in 1790 (Act of May 31, 1790, ch. 15, 1 Stat. 124). Thereafter, the statute was revised from time to time, notably in 1802, 1831, 1870, and 1891. In 1909, the present statute was passed (Act of March 4, 1909, ch. 320, 35 Stat. 1075) and later was codified as 17 U.S.C. (Act of July 30, 1947, 61 Stat. 652).

distinguished "copying" from "printing," "reprinting," and "publishing," and provided that the copyright in books is infringed by "printing," "reprinting" and "publishing," while the copyright in other works (*e.g.*, photographs, paintings, engraving, drawings, etc.) is infringed by "copying." *Cf. Harper* v. *Shoppell*, 26 F. 519, 520 (C.C.S.D.N.Y. 1886). The 1909 Act obliterated any such distinction in its text. It provides in § 5 a list of all classes of copyrightable subject matter (including books and periodicals), and says in § 1 that the owner of copyright shall have the exclusive right "to print, reprint, publish, copy and vend the copyrighted work." Thus, the 1909 Act, unlike the earlier statutes, does not expressly say which of the proscribed acts of § 1 apply to which classes of copyrightable subject matter of § 5. Defendant and some of the amici say that, to be consistent with the intent and purpose of earlier statutes, the "copying" proscription of § 1 should not apply to books or periodicals; rather, only the proscribed acts of "printing," "reprinting" and "publishing" control books and periodicals. The proponents of this view stress that the legislative history of the 1909 legislation does not suggest any purpose to alter the previous coverage.[8]

This is quite a serious argument. However, in view of Congress's general inclusion of the word "copy" in Section 1 and of the practice under the Act since 1909, we are not ready to accept fully this claim that infringement of periodical articles can come only through "printing," "reprinting" or "publishing." But we do believe this point—that there is a solid doubt whether and how far "copy" applies to books and journals—must be taken into account in measuring the outlines of "copying" as it involves books and articles.

Adding to this doubt that "copy" blankets such printed matter is the significant implication of a special segment of the background of the 1909 statute, a sector of history which is peripheral but revealing. The then Librarian of Congress,

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[8] For instance, H.R. REP. No. 2222, 60th Cong., 2d Sess. 4 (1909) states: "Subsection (a) of section 1 adopts without change the phraseology of section 4952 of the Revised Statutes, and this, with the insertion of the word 'copy,' practically adopts the phraseology of the first copyright act Congress ever passed—that of 1790. Many amendments of this were suggested, but the committee felt that it was safer to retain without change the old phraseology which has been so often construed by the courts."

Herbert Putnam, was the leading public sponsor of that Act (outside of Congress itself), and was intimately involved in its preparation from at least 1906 on. While the bill was being considered in Congress, the Library's 1908 "Rules and Practice Governing the Use and Issue of Books," p. 6, specifically provided:

> "*Photographing.* Photographing is freely permitted. The permission extends to the building itself and any of its parts, including the mural decorations. *It extends to articles bearing claim of copyright*, but the Library gives no assurance that the photograph may be reproduced or republished or placed on sale. These are matters to be settled with the owner of the copyright" (emphasis added).

After the 1909 Act became law, the Library continued the same provision. The 1913 version of the "Rules and Practice"[9] added the following on "Photostat," after the above paragraph on "Photographing":

> Photo-duplicates of books, newspapers, maps, etc. can be furnished at a reasonable rate by means of the photostat, installed in the Chief Clerk's Office. Apply to the Chief Clerk for a schedule of charges.

Later editions, throughout Dr. Putnam's tenure (which ended in 1939), contained the same or comparable provisions.[10] Indeed, when he left his post in 1939, he was honored by the American Council of Learned Societies because (among other things) "You have led in adapting the most modern photographic processes to the needs of the scholar, and have * * * made widely available for purposes of research copies of your collections * * *." This illuminating slice of history, covering the time of enactment and the first three decades of the 1909 Act, should not be ignored.

These are the leading reasons why we cannot stop with the dictionary or "normal" definition of "copy"—nor can we extract much affirmative help from the surfacial legislative text. As for the other rights given in Section 1, "vend" is clearly irrelevant (since NIH and NLM do not sell), and the applicability to this case of "print," "reprint" and "publish" is more dubious than of "copy." The photocopy process

[9] There was an 1911 edition, but no copy has been located.

[10] The Library's current practice is described in Part III, 3, note 16, *infra*.

of NIH and NLM, described in Part I, *supra*, does not even amount to printing or reprinting in the strict dictionary sense; and if the words be used more broadly to include all mechanical reproduction of a number of copies, they would still not cover the making of a single copy for an individual requester. If the requester himself made a photocopy of the article for his own use on a machine made available by the library, he might conceivably be "copying" but he would not be "printing" or "reprinting." The library is in the same position when responding to the demands of individual researchers acting separately.

For similar reasons there is no "publication" by the library, a concept which invokes general distribution, or at least a supplying of the material to a fairly large group.[11] The author of an uncopyrighted manuscript does not lose his common law rights, via publication, by giving photocopies to his friends for comment or their personal use—and publication for Section 1 purposes would seem to have about the same coverage. In any event, the hitherto uncodified principles of "fair use" apply to printing, reprinting, and publishing, as well as to copying, and therefore the collocation of general words Congress chose for Section 1 is necessarily inadequate, by itself, to decide this case.

III

In the fifty-odd years since the 1909 Act, the major tool for probing what physical copying amounts to unlawful "copying" (as well as what is unlawful "printing," "reprinting" and "publishing") has been the gloss of "fair use" which the courts have put upon the words of the statute. Precisely because a determination that a use is "fair," or "unfair," depends on an evaluation of the complex of individual and varying factors bearing upon the particular use (see H.R. Rep. No. 83, 90th Cong., 1st Sess., p. 29), there has been no exact or detailed definition of the doctrine. The courts, congressional committees, and scholars have had to be content

[11] To the extent that *Macmillan Co.* v. *King*, 223 F. 862 (D. Mass. 1914), may possibly suggest that "publication" can occur through simple distribution to a very small restricted group, for a special purpose, we think the opinion goes too far.

with a general listing of the main considerations—together with the example of specific instances ruled "fair" or "unfair." These overall factors are now said to be: (a) the purpose and character of the use, (b) the nature of the copyrighted work, (c) the amount and substantiality of the material used in relation to the copyrighted work as a whole, and (d) the effect of the use on a copyright owner's potential market for and value of his work.

In addition, the development of "fair use" has been influenced by some tension between the direct aim of the copyright privilege to grant the owner a right from which he can reap financial benefit and the more fundamental purpose of the protection "To promote the Progress of Science and the useful Arts." U.S. Const., art. 1, § 8. The House committee which recommended the 1909 Act said that copyright was "[n]ot primarily for the benefit of the author, but primarily for the benefit of the public." H.R. Rep. No. 2222, 60th Cong., 2d Sess., p. 7. The Supreme Court has stated that "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration." *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954); *United States* v. *Paramount Pictures*, 334 U.S. 131, 158 (1948). *See* Breyer, *The Uneasy Case for Copyright: A study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281 (1970). To serve the constitutional purpose, "'courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry.' *Berlin* v. *E.C. Publications, Inc.*, 329 F. 2d 541, 544 (2d Cir. 1964). Whether the privilege may justifiably be applied to particular materials turns initially on the nature of the materials, e.g., whether their distribution would serve the public interest in the free dissemination of information and whether their preparation requires some use of prior materials dealing with the same subject matter. Consequently, the privilege has been applied to works in the fields of science, law, medicine, history and biography." *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 303, 307 (C.A. 2, 1966).

It has sometimes been suggested that the copying of an entire copyrighted work, any such work, cannot ever be

"fair use," but this is an overbroad generalization, unsupported by the decisions [12] and rejected by years of accepted practice. The handwritten or typed copy of an article, for personal use, is one illustration, let alone the thousands of copies of poems, songs, or such items which have long been made by individuals, and sometimes given to lovers and others. Trial Judge James F. Davis, who considered the use now in dispute not to be "fair," nevertheless agreed that a library could supply single photocopies of entire copyrighted works to attorneys or courts for use in litigation. It is, of course, common for courts to be given photocopies of recent decisions, with the publishing company's headnotes and arrangement, and sometimes its annotations. There are other examples from everyday legal and personal life. We cannot believe, for instance, that a judge who makes and gives to a colleague a photocopy of a law review article, in one of the smaller or less available journals, which bears directly on a problem both judges are then considering in a case before them is infringing the copyright, rather than making "fair use" of his issue of that journal. Similarly with the photocopies of particular newspaper items and articles which are frequently given or sent by one friend to another.[13]

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[12] *Leon* v. *Pacific Tel. & Tel. Co.*, 91 F. 2d 484, 486 (C.A. 9, 1937) and *Public Affairs Associates, Inc.* v. *Rickover*, 284 F. 2d 262, 272 (C.A.D.C. 1960), *vacated and remanded*, 369 U.S. 111 (1962), which are often cited in this connection, both involved actual publication and distribution of many copies, not the simple making of a copy for individual personal or restricted use. In *Wihtol* v. *Crow*, 309 F. 2d 777 (C.A. 8, 1962), 48 copies of the copyrighted song were made and distributed, and there were a number of public performances using these copies. It was as if the defendant had purchased one copy of sheet music and then duplicated it for an entire chorus.

On the other hand, *New York Tribune, Inc.* v. *Otis & Co.*, 39 F. Supp. 67 (S.D.N.Y. 1941), shows that copying of an entire copyrighted item is not enough, in itself, to preclude application of "fair use." Although it was already plain that an entire copyrighted item (a newspaper editorial) had been reproduced, the court ordered further proceedings to take account of other factors.

[13] Verner Clapp, former Acting Librarian of Congress, has pointed out some of the uses of a photocopy for which the library copy original is unsuited (*Can Copyright Law Respond to the New Technology?*, 61 Law Lib. J. 387, 407 (1968):

"I cannot submit the original conveniently in a court, in a suit of law. I cannot put the original into my filing cabinet. I can't shuffle it with notes in preparation for an address. I can't make notes on it. I can't conveniently give it to a typist. I can't use it as printer's copy. I can't send it through the mail without serious risk of loss of an original. With a photocopy I can do all these things and more, and this is the reason I want a copy."

There is, in short, no inflexible rule excluding an entire copyrighted work from the area of "fair use." Instead, the extent of the copying is one important factor, but only one, to be taken into account, along with several others.

Under these over-all standards, we have weighed the multiplicity of factors converging on the particular use of plaintiff's material made by NIH and NLM, as shown by this record. There is no prior decision which is dispositive and hardly any that can be called even close; we have had to make our own appraisal. The majority of the court has concluded that, on this record, the challenged use should be designated "fair," not "unfair." In the rest of this part of our opinion, we discuss *seriatim* the various considerations which merge to that conclusion. But we can help focus on what is probably the core of our evaluation by stating summarily, in advance, three propositions we shall consider at greater length: First, plaintiff has not in our view shown, and there is inadequate reason to believe, that it is being or will be harmed substantially by these specific practices of NIH and NLM; second, we are convinced that medicine and medical research will be injured by holding these particular practices to be an infringement; and, third, since the problem of accommodating the interests of science with those of the publishers (and authors) calls fundamentally for legislative solution or guidance, which has not yet been given, we should not, during the period before congressional action is forthcoming, place such a risk of harm upon science and medicine.

1. We start by emphasizing that (a) NIH and NLM are non-profit institutions, devoted solely to the advancement and dissemination of medical knowledge which they seek to further by the challenged practices, and are not attempting to profit or gain financially by the photocopying; (b) the medical researchers who have asked these libraries for the photocopies are in this particular case (and ordinarily) scientific researchers and practitioners who need the articles for personal use in their scientific work and have no purpose to reduplicate them for sale or other general distribution; and (c) the copied articles are scientific studies useful to the requesters in their work. On both sides—library and requester—scientific progress, untainted by any commerical

gain from the reproduction, is the hallmark of the whole enterprise of duplication. There has been no attempt to misappropriate the work of earlier scientific writers for forbidden ends, but rather an effort to gain easier access to the material for study and research. This is important because it is settled that, in general, the law gives copying for scientific purposes a wide scope. *See, e.g., Rosemont Enterprises, Inc.* v. *Random House, Inc., supra*, 366 F. 2d at 306–07; *Loew's, Inc.* v. *Columbia Broadcasting System, Inc.*, 131 F. Supp. 165, 175 (S.D. Cal. 1955), *aff'd*, 239 F. 2d 532 (C.A. 9, 1956), *aff'd by an equally divided Court*, 356 U.S. 43 (1958); *Greenbie* v. *Noble*, 151 F. Supp. 45, 67–68 (S.D.N.Y. 1957); *Thompson* v. *Gernsback*, 94 F. Supp. 453, 454 (S.D.N.Y. 1950); *Henry Holt & Co.* v. *Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 304 (E.D. Pa. 1938).

2. Both libraries have declared and enforced reasonably strict limitations which, to our mind, keep the duplication within appropriate confines. The details are set forth in Part I *supra*, and in our findings. Both institutions normally restrict copying on an individual request to a single copy of a single article of a journal issue, and to articles of less than 50 pages. Though exceptions are made, they do not appear to be excessive, unwarranted, or irrational. For instance, though on occasion one person was shown to have ordered or received more than one photocopy of the same article, the second copy was for a colleague's use or to replace an illegible or undelivered copy. Some care is also taken not to have excessive copying from one issue or one volume of the periodical. While a certain amount of duplication of articles does, of course, occur, it does not appear to be at all heavy.[14] There is no showing whatever that the recipients use the libraries' photocopying process to sell the copies or distribute them broadly.

NIH responds only to requests from its own personnel, so that its entire photoduplication system is strictly "in-house"—in the same way that a court's library may supply

[14] One survey of NIH operations shows only 4 instances of duplication in over 200 requests; at NLM, as of 1964, duplication occurred at a 10% rate in the 102 most heavily used journals (constituting one-third of total requests); if all requests were considered, the rate would be less. The Sophar & Heilprin report (see Appendix), which is not friendly to library photocopying, estimates that for libraries generally the duplication rate was about 3% (p. iii).

a judge of that court with a copy of a law journal article or a reported decision. NLM fulfills requests more generally but it has adopted the practice of not responding (outside of the Government) where the article appears in a recent (preceding 5 years) issue of a periodical on its "widely-available list". The result is that the duplication of recent issues of generally available journals is kept within the Government, and distribution to the larger medical public is limited to older, less available issues and to journals which are harder to obtain from medical libraries. It is a fair inference, supported by this record, that at the very least in the latter classes the demand has been inadequately filled by reprints and the publisher's sale of back issues. *See, also*, Part III, 4, *infra*. In those instances not covered by "five year" policy, the impression left by the record is that, on the whole, older rather than current articles were usually requested.

Brushing aside all such breakdowns, plaintiff points to the very large number, in absolute terms, of the copies made each year by the two libraries. We do not think this decisive.[15] In view of the large numbers of scientific personnel served and the great size of the libraries—NIH has over 100,000 volumes of journal materials alone, and NLM is currently binding over 18,000 journals each year—the amount of copying does not seem to us to have been excessive or disproportionate. The important factor is not the absolute amount, but the twin elements of (i) the existence and purpose of the system of limitations imposed and enforced, and (ii) the effectiveness of that system to confine the duplication for the personal use of scientific personnel who need the material for their work, with the minimum of potential abuse or harm to the copyright owner. The practices of NIH and NLM, as shown by the record, pass both of these tests, despite the large number of copies annually sent out.

Without necessarily accepting the full sweep of the concept that the library is nothing more than the individual requester's ministerial agent, we do agree that the NIH and NLM systems, as described in the evidence, are close kin to the current Library of Congress policy, *see* note 16, *infra*,

[15] In 1970, NIH copied 85,744 and NLM 93,746 articles.

of maintaining machines in the library buildings so that readers can do their own copying. The principal extension by NLM and NIH is to service requesters who cannot conveniently come to the building, as well as out-of-town libraries. But the personal, individual focus is still present. The reader who himself makes a copy does so for his own personal work needs, and individual work needs are likewise dominant in the reproduction programs of the two medical libraries—programs which are reasonably policed and enforced.

3. We also think it significant, in assessing the recent and current practices of the two libraries, that library photocopying, though not of course to the extent of the modern development, has been going on ever since the 1909 Act was adopted. In Part II, *supra*, we have set forth the practice of the Library of Congress at that time and for many years thereafter.[16] In fact, photocopying seems to have been done in the Library at least from the beginning of this century. *Can Copyright Law Respond to the New Technology?* 61 Law. Lib. J. 387, 400 (1968) (comments of V. Clapp). In 1935 there was a so-called "gentlemen's agreement" between the National Association of Book Publishers (since defunct) and the Joint Committee on Materials for Research (representing the libraries), stating in part: "A library * * * owning books or periodical volumes in which copyright still subsists may make and deliver a single photographic reproduction * * * of a part thereof to a scholar representing in writing that he desires such reproduction in lieu of loan of such publication or in place of manual transcription and solely for the purposes of research * * *." Though this understanding discountenanced photoduplication of an entire book it was regularly construed as allowing copying of articles. There have been criticisms of this pact, and we cite it, not as binding in any way on plaintiff or any other pub-

[16] Currently, and for some time, the Library of Congress has said that copyright material will "ordinarily" not be photocopied by the Library "without the signed authorization of the copyright owner," but "[e]xceptions to this rule may be made in particular cases." The Library does, however, maintain machines which readers may themselves use for photocopying; these machines contain notices saying that "a single photocopy of copyrighted material may be made only for the purpose of study, scholarship, or research, and for no other purpose" and "the sale and/or further reproduction of any photocopied copyrighted materials is illegal."

lisher, or as showing universal recognition of "single" photocopying, but as representing a very widely held view, almost 40 years ago, of what was permissible under the 1909 statute.

There is other evidence that, until quite recently, library photocopying was carried on with apparent general acceptance. Witnesses in this case testified that such photocopying has been done for at least fifty years and is well-established. The National Library of Medicine Act, in 1956, by which NLM was created (42 U.S.C. § 275, *et seq.*), provided at § 276(4) that the Secretary of Health, Education, and Welfare, through NLM, should "make available, through loans, photographic or other copying procedures or otherwise, such materials in the Library as he deems appropriate * * *"; and the Medical Library Assistance Act of 1965 (42 U.S.C. § 280b–1, *et seq.*) provided that grants be made to medical libraries for, among other things, "acquisition of duplicating devices, facsimile equipment * * * and other equipment to facilitate the use of the resources of the library." 42 U.S.C. § 280b–7. These two pieces of legislation indicate to us that Congress knew in 1956 and 1965 of the practice of library photocopying, and assumed that it was not beyond the pale. The General Interlibrary Loan Code (revised in 1956), *see* Part I, *supra*, is a similar indication of the extent of the practice, and of the general position of the libraries (at the least) that such copying is permissible.

The fact that photocopying by libraries of entire articles was done with hardly any (and at most very minor) complaint, until about 10 or 15 years ago, goes a long way to show both that photoduplication cannot be designated as infringement *per se*, and that there was at least a time when photocopying, as then carried on, was "fair use." There have been, of course, considerable changes in the ease and extent of such reproduction, and these developments bear on "fair use" as of today, but the libraries can properly stand on the proposition that they photocopied articles for many years, without significant protest, and that such copying was generally accepted until the proliferation of inexpensive and improved copying machines, less than two decades ago, led to the surge in such duplication. The question then becomes whether this

marked increase in volume changes a use which was generally accepted as "fair" into one which has now become "unfair."

4. There is no doubt in our minds that medical science would be seriously hurt if such library photocopying were stopped. We do not spend time and space demonstrating this proposition. It is admitted by plaintiff and conceded on all sides. *See, e.g. Varmer, Photoduplication of Copyrighted Material by Libraries*, Study No. 15, "Copyright Law Revision," Studies Prepared for the Subcommittee on Patents, Trademarks and Copyrights, Senate Judiciary Committee (1959), p. 49; Memorandum of General Counsel Willcox, Department of Health, Education and Welfare, June 7, 1965, Hearings before Subcommittee No. 3, Committee on the Judiciary, H. of Reps., 89th Cong., 1st Sess., on H.R. 4347, H.R. 5680, etc., "Copyright Law Revision," Part 2, 1132, 1133. The trial testimony of a number of the requesters and authors documents the point. The supply of reprints and back numbers is wholly inadequate; the evidence shows the unlikelihood of obtaining such substitutes for photocopies from publishers of medical journals or authors of journal articles, especially for articles over three years old.[17] It is, moreover, wholly unrealistic to expect scientific personnel to subscribe regularly to large numbers of journals which would only occasionally contain articles of interest to them. Nor will libraries purchase extensive numbers of whole subscriptions to all medical journals on the chance that an indeterminate number of articles in an indeterminate number of issues will be requested at indeterminate times. The result of a flat proscription on library photocopying would be, we feel sure, that medical and scientific personnel would simply do without, and have to do without, many of the articles they now desire, need, and use in their work.[18]

5. Plaintiff insists that it has been financially hurt by the photocopying practices of NLM and NIH, and of other libraries. The trial judge thought that it was reasonable to infer that the extensive photocopying has resulted in some

[17] Plaintiff itself publishes a notice to the effect that it does not attempt to keep a stock of back issues, and it refers requests for reprints to the author.

[18] We think the alternative of compulsory licensing is not open to us under the present copyright statute. *See, infra*, Parts III, 6, and IV.

loss of revenue to plaintiff and that plaintiff has lost, or failed to get, "some undetermined and indeterminable number of journal subscriptions (perhaps small)" by virtue of the photocopying. He thought that the persons requesting photocopies constituted plaintiff's market and that each photocopy user is a potential subscriber "or at least a potential source of royalty income for licensed copying." [19] Studies rejecting as "fair use" the kind of photocopying involved here have also assumed, without real proof, that the journal publishers have been and will be injured. *See, e.g., Project—New Technology and the Law of Copyright: Reprography and Computers*, 15 U.C.L.A. L. Rev. 931 (1968); *Sophor & Heilprin, "The Determination of Legal Facts and Economic Guideposts with Respect to the Dissemination of Scientific and Educational Information as It Is Affected by Copyright—A Status Report"* (1967).

The record made in this case does not sustain that assumption. Defendant made a thorough effort to try to ascertain, so far as possible, the effect of photoduplication on plaintiff's business, including the presentation of an expert witness. The unrefuted evidence shows that (a) between 1958 and 1969 annual subscriptions to the four medical journals involved increased substantially (for three of them, very much so), annual subscription sales likewise increased substantially, and total annual income also grew; (b) between 1959 and 1966, plaintiff's annual taxable income increased from $272,000 to $726,000, fell to $589,000 in 1967, and in 1968 to $451,000; (c) but the four journals in suit account for a relatively small percentage of plaintiff's total business and over the years each has been profitable (though 3 of them show losses in particular years and in all years the profits have not been large, varying from less than $1,000 to about $15,000, some of which has been shared with the sponsoring

[19] It is wrong to measure the detriment to plaintiff by loss of presumed royalty income—a standard which necessarily assumes that plaintiff had a right to issue licenses. That would be true, of course, only if it were first decided that the defendant's practices did not constitute "fair use." In determining whether the company has been sufficiently hurt to cause these practices to become "unfair," one cannot assume at the start the merit of the plaintiff's position, i.e., that plaintiff had the right to license. That conclusion results only if it is first determined that the photocopying is "unfair."

medical societies);[20] and (d) plaintiff's business appears to have been growing faster than the gross national product or of the rate of growth of manpower working in the field of science. Defendant's expert concluded that the photocopying shown here had not damaged plaintiff, and may actually have helped it.[21] The record is also barren of solid evidence that photocopying has caused economic harm to any other publisher of medical journals.

Plaintiff has never made a detailed study of the actual effect of photocopying on its business, nor has it refuted defendant's figures. It has relied for its assumption (in the words of the chairman of its board) on "general business common sense and things that you hear from subscribers, librarians and so forth." Its argument—and that of the other supporters of its position[22]—is that there "must" be an effect because photocopies supplant the original articles, and if there were no photocopying those who now get the copies would necessarily buy the journals or issues. But this untested hypothesis, reminiscent of the abstract theorems beloved of the "pure" classical economics of 70 or 80 years ago, is neither obvious nor self-proving. One need not enter the semantic debate over whether the photocopy supplants the original article itself or is merely in substitution for the library's loan of the original issue to recognize, as we have already pointed out, that there are other possibilities. If photocopying were forbidden, the researchers, instead of subscribing to more journals or trying to obtain or buy back-issues or reprints (usually unavailable), might expend extra time in note-taking or waiting

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[20] Defendant explains the loss years and the fall-off in some subscriptions in some years as due to particular circumstances (which are spelled out) other than photocopying.

[21] The trial judge referred to two instances in which subscribers cancelled subscriptions because of the availability of photocopying. Defendant is correct that both instances rest on hearsay, and in any event this small number of purported cancellations is *de minimis* in view of the more solid and detailed proof as to the health of plaintiff's journals and the increase in their subscription lists.

[22] The published literature does not reveal any careful, thorough, impartial study of this question. Often there is no attempt to ascertain the actual economic impact on the publishers and authors; when inquiry has been made of the latter, their conclusory generalizations of injury have been accepted uncritically.

their turn for the library's copies of the original issues—or they might very well cut down their reading and do without much of the information they now get through NLM's and NIH's copying system. The record shows that each of the individual requesters in this case already subscribed, personally, to a number of medical journals, and it is very questionable how many more, if any, they would add. The great problems with reprints and back-issues have already been noted. In the absence of photocopying, the financial, time-wasting, and other difficulties of obtaining the material could well lead, if human experience is a guide, to a simple but drastic reduction in the use of the many articles (now sought and read) which are not absolutely crucial to the individual's work but are merely stimulating or helpful. The probable effect on scientific progress goes without saying, but for this part of our discussion the significant element is that plaintiff, as publisher and copyright owner, would not be better off. Plaintiff would merely be the dog in the manger.

Since plaintiff and those who take the same view have not attempted any hard factual study of the actual effect of photocopying, it is not surprising that others have concluded against an adverse impact. The 1962 Fry Report (George Fry & Associates, "Survey of Copyrighted Material Reproduction Practices in Scientific and Technical Fields," March 1962) states that the "basic conclusion of this report is that at the present time, no significant damage occurs to the copyright holders in the scientific and technical fields although duplication of this material is widespread and is growing rapidly." In March 1965, Dan Lacy, Managing Director, American Book Publishers Council, told a House of Representatives committee: "It has been pointed out that recent technological developments have enormously increased the amount of photocopying in libraries and technology is continuing to change rapidly. Most of this photocopying, at least at present, probably consists of excerpts and probably mostly of journal articles. *Most of it at present is probably undertaken in lieu of manual note taking, typing, or handwriting a copy, and in lieu of library loan rather than in lieu of buying a copy*" (emphasis added). Hearings before Subcommittee No. 3, Committee on the

Judiciary, H. of Reps., 89th Cong., 1st Sess., on H.R. 4347, H.R. 5680, etc., "Copyright Law Revision," Part 1, p. 120. The record in this case does not prove that the situation was any different at the time of the trial.

To us it is very important that plaintiff has failed to prove its assumption of economic detriment, in the past or potentially for the future. One of the factors always considered with respect to "fair use," *see supra*, is the effect of the use on the owner's potential market for the work. This record simply does not show a serious adverse impact, either on plaintiff or on medical publishers generally, from the photocopying practices of the type of NIH and NLM. In the face of this record, we cannot mechanically assume such an effect, or hold that the amount of photoduplication proved here "must" lead to financial or economic harm. This is a matter of proof and plaintiff has not transformed its hypothetical assumption, by evidence, into a proven fact.

In this connection it is worth noting that plaintiff does not have to concern itself, with respect to these journals, with authors or medical societies who are interested in a financial return. The authors, with rare exceptions, are not paid for their contributions, and those societies which share profits do not press for greater financial benefits. Indeed, some of the authors of the copied articles involved in this case testified at the trial that they favored photocopying as an aid to the advancement of science and knowledge.

6. Added to the powerful factors we have been considering is another (already suggested by the discussion in Part II, *supra*)—the grave uncertainty of the coverage of "copy" in Section 1 of the 1909 Act and the doubt whether it relates at all to periodicals.[23] The latitude for "fair use" is of course lessened to the extent Congress has been explicit in spelling out protection to the copyright owner. But Congress has, up to now, left the problem of photocopying untouched by express provision and only doubtfully covered to any extent by the generalizations of Section 1. The statute must, of course, "be applied to new situations not anticipated by Congress, if, fairly construed, such situations come within its intent and meaning" (*Jerome H. Remick & Co.* v. *American Automobile*

[23] The same is true of "print," "reprint," and "publish," as applied to the challenged practices of NLM and NIH.

Accessories Co., 5 F. 2d 411 (C.A. 6, 1925), *cert. denied*, 269 U.S. 556), but our problem is with the latter part of this quotation. That being so, we think that, in evaluating "fair use," we should give the benefit of the doubt—until Congress acts more specifically—to science and the libraries, rather than to the publisher and the owner.

While, as we have said, this record fails to show that plaintiff (or any other medical publisher) has been substantially harmed by the photocopying practices of NIH and NLM, it does show affirmatively that medical science will be hurt if such photocopying is stopped. Thus, the balance of risks is definitely on defendant's side—until Congress acts more specifically, the burden on medical science of a holding that the photocopying is an infringement would appear to be much greater than the present or foreseeable burden on plaintiff and other medical publishers of a ruling that these practices fall within "fair use."

Plaintiff's answer is that it is willing to license the libraries, on payment of a reasonable royalty, to continue photocopying as they have. Our difficulty with that response—in addition to the absence of proof that plaintiff has yet been hurt, and the twin doubts whether plaintiff has a viable license system and whether any satisfactory program can be created without legislation [24]—is that the 1909 Act does not provide for compulsory licensing in this field. All that a court can do is to determine the photocopying an infringement, leaving it to the owner to decide whether to license or to prohibit the practice. Plaintiff and other publishers cannot enjoin governmental libraries (because 28

[24] Defendant and its amici strongly attack plaintiff's so-called licensing plan as nothing more than a shell. The American Library Association points out, for instance, that the Williams & Wilkins license would apparently not apply to inter-library loans or to requests from persons not physically present in the library building.

There is also debate over whether a feasible ASCAP-type or clearinghouse system can be developed without legislation, and if so whether it would be desirable. *See, e.g., Note, Education and Copyright Law: An Analysis of the Amended Copyright Revision Bill and Proposals for Statutory Licensing and a Clearinghouse System*, 56 Va. L. Rev. 664 (1970); also published as MacLean, *Education and Copyright Law: An Analysis of the Amended Copyright Revision Bill and Proposals for Statutory Licensing and a Clearinghouse System*, in ASCAP, *"Copyright Law Symposium, Number Twenty,"* 1 (1972); Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs*, 84 Harv. L. Rev. 281, 330 *ff.* (1970); Note: *New Technology and the Law of Copyright: Reprography and Computers*, 15 UCLA L. Rev. 939, 961 *ff.* (1968).

U.S.C. § 1498, *supra* note 1, is the sole remedy), but if photocopying of this type is an infringement the owners are free under the law to seek to enjoin any and all nongovernmental libraries. A licensing system would be purely voluntary with the copyright proprietor. We consider it entirely beyond judicial power, under the 1909 Act,[25] to order an owner to institute such a system if he does not wish to. We think it equally outside a court's present competence to turn the determination of "fair use" on the owner's willingness to license—to hold that photocopying (without royalty payments) is not "fair use" if the owner is willing to license at reasonable rates but becomes a "fair use" if the owner is adamant and refuses all permission (or seeks to charge excessive fees).

The truth is that this is now preeminently a problem for Congress: to decide the extent photocopying should be allowed, the questions of a compulsory license and the payments (if any) to the copyright owners, the system for collecting those payments (lump-sum, clearinghouse, etc.), the special status (if any) of scientific and educational needs. Obviously there is much to be said on all sides. The choices involve economic, social, and policy factors which are far better sifted by a legislature. The possible intermediate solutions are also of the pragmatic kind legislatures, not courts, can and should fashion. But Congress does not appear to have put its mind directly to this problem in 1909, undoubtedly because the issue was not considered pressing at that time. That statute is, unfortunately, the one we must apply, and under it we have the choice only of thumb's up or thumb's down, for the photocopying practice involved in this litigation, without any real Congressional guidance. Intermediate or compromise solutions are not within our authority.[26] The scheme of this subpart 6 of Part III of the opinion is that, on balance and on this record, thumb's up seems to us less dangerous to the varying interests at stake during the period which remains before Congress definitively takes hold of the subject.

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[25] A court's powers under the anti-trust legislation is another matter.

[26] It has been suggested, however, that publishers now have the power to adopt the intermediate solution of charging more for subscriptions sold to libraries or other entities which engage regularly in photocopying.

7. The revision of the 1909 Act is now under consideration and has been for several years. The House of Representatives passed a bill in the 90th Congress (in April 1967), but the Senate has not acted.[27] In its report on the bill which the House adopted (H.R. REP. No. 83, 90th Cong., 1st Sess.), the House Committee on the Judiciary discussed the existing doctrine of "fair use" at some length (pp. 29–37). We cite these comments, not as binding on us, but as the official views on the extent of "fair use" of the committee of the House of Representatives with cognizance over copyright; as such, they are and should be influential.

The report makes it very clear that photocopying can be a "fair use", in proper circumstances; it negatives the notion that copying of a complete work can never be a "fair use"; and it obviously believes that the doctrine is flexible, depending upon the particular situation.[28] The report does not, however, express a categorical or clear view whether photocopying of the sort we have in this case is or is not a "fair use" under the doctrine as it has been developing. Rather, the committee's observations are delphic, with each side being able to quote to us one or another passage, or to argue by analogy from the specific situation (classroom teaching) considered in greatest detail in the report.

Specifically on library photocopying the committee says (p. 36) that it does not favor a specific provision dealing with that subject, and it adds: "Unauthorized library copying, like everything else, must be judged a fair use or an infringement on the basis of all of the applicable criteria and the facts of the particular case. Despite past efforts, reasonable

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[27] A synopsis of the revision effort (up to 1968) is set forth in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 396 n. 17 (1968).

[28] The report says (p. 29) that "• • • since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts"; that (p. 32) the committee endorses "the purpose and general scope of the judicial doctrine of fair use, as outlined earlier in this report, but there is no disposition to freeze the doctrine in the statute, especially during a period of technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis; and that (p. 32) "Section 107, as revised by the committee, is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."

arrangements involving a mutual understanding of what generally constitutes acceptable library practices, and providing workable clearance and licensing conditions, have not been achieved and are overdue. The committee urges all concerned to resume their efforts to reach an accommodation under which the needs of scholarship and the rights of authors would both be respected."

We read this report, as a whole, as recognizing affirmatively that, under the existing law, library photocopying can be "fair use" in proper circumstances, and as leaving the determination of whether the particular circumstances are proper ones to an evaluation "of all the applicable criteria and the facts of the particular case." That is, of course, the overall standard we are using, and therefore we consider our approach to be consistent with that of the Committee. Although one cannot say that the report places its sanction directly on the photocopying practices now before us, neither does it suggest or intimate that they are "unfair." That question is left open. The report is nevertheless helpful because it indicates the correctness of our general approach, and also because it contradicts the concept, urged by plaintiff, that photocopying of an entire article is necessarily an infringement.

8. The last component we mention, as bearing on "fair use", is the practice in foreign countries. The copyright legislation of the United Kingdom, New Zealand, Denmark, Finland, Italy, Norway, Sweden, France, the German Federal Republic, Lichtenstein, Mexico, the Netherlands, and the U.S.S.R. have specific provisions which we think would cover the photocopying activities of NLM and NIH. Canada, India, Ireland and South Africa, while having no specific provisions permitting copying of copyrighted works for the purposes of private research and study, do provide, more generally, that fair dealing for purposes of private study or research shall not be an infringement.[29] These provisions in foreign countries with problems and backgrounds comparable to our own are highly persuasive that the copying done

[29] The foreign laws are compiled in *Copyright Laws and Treaties of the World*, published by UNESCO.

here should be considered a "fair use," not an infringement.[30] Where Congress has left such a large void to be filled entirely by the courts, it is appropriate for us to consider what other jurisdictions have done either by way of legislation or judicial decision.

IV

Fusing these elements together, we conclude that plaintiff has failed to show that the defendant's use of the copyrighted material has been "unfair," and conversely we find that these practices have up to now been "fair." There has been no infringement. As Professor (now Mr. Justice) Kaplan observed, it is "fundamental that 'use' is not the same as 'infringement' [and] that use short of infringement is to be encouraged * * *." Kaplan, *An Unhurried View of Copyright* 57 (1967); *see Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390, 393–95 (1968).

So as not to be misunderstood, we reemphasize four interrelated aspects of our holding. The first is that the conclusion that defendant's particular use of plaintiff's copyrighted material has been "fair" rests upon all of the elements discussed in Part III, *supra*, and not upon any one, or any combination less than all. We do not have to, and do not, say that any particular component would be enough, either by itself or together with some of the others. Conversely, we do not have to, and do not, say that all the elements we mention are essential to a finding of "fair use." They all happen to be present here, and it is enough for this case to rule, as we do, that at least when all co-exist in combination a "fair use" is made out.

Connected with this point is the second one that our holding is restricted to the type and context of use by NIH and NLM, as shown by this record. That is all we have before us, and we do not pass on dissimilar systems or uses of copyrighted materials by other institutions or enterprises, or in other

[30] The general report of the Committee of Experts on the Photographic Reproduction of Protected Works [a joint committee of UNESCO and the United International Bureau for the Protection of Intellectual Property (BIRPI)] recommended that libraries should have the right to provide one copy free of copyright for each user provided that such copy, in the case of a periodical, shall not be more than a single article. 4 *Copyright* 195, 197 (1968).

fields, or as applied to items other than journal articles, or with other significant variables. We have nothing to say, in particular, about the possibilities of computer print-outs or other such products of the newer technology now being born. Especially since we believe, as stressed *infra*, that the problem of photo and mechanical reproduction calls for legislative guidance and legislative treatment, we feel a strong need to obey the canon of judicial parsimony, being stingy rather than expansive in the reach of our holding.

The third facet articulates the same general premise—our holding rests upon this record which fails to show a significant detriment to plaintiff but does demonstrate injury to medical and scientific research if photocopying of this kind is held unlawful. We leave untouched, because we do not have to reach them, the situations where the copyright owner is shown to be hurt or the recipients (or their interests) would not be significantly injured if the reproductions were ruled to infringe.

Finally, but not at all least, we underline again the need for Congressional treatment of the problems of photocopying. The 1909 Act gives almost nothing by way of directives, the judicial doctrine of "fair use" is amorphous and open-ended, and the courts are now precluded, both by the Act and by the nature of the judicial process, from contriving pragmatic or compromise solutions which would reflect the legislature's choices of policy and its mediation among the competing interests. The Supreme Court has pointed out that such a "job is for Congress" (*Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390, 401 (1968)), and in an earlier copyright case in which it was recognized that the owner might be morally or economically entitled to protection the Court applied "the act of Congress [as it] now stands," saying that the other "considerations properly address themselves to the legislative and not to the judicial branch of the Government." *White-Smith Music Co.* v. *Apollo Co.*, 209 U.S. 1, 18 (1908). Hopefully, the result in the present case will be but a "holding operation" in the interim period before Congress enacts its preferred solution.

On this record and for these reasons, we hold the plaintiff not entitled to recover and dismiss the petition.

Appendix

SOME DISCUSSIONS OF LIBRARY PHOTOCOPYING

B. Varmer, Photoduplication of Copyrighted Material by Libraries, Study No. 15, Copyright Law Revision, Studies Prepared for Senate Comm. on the Judiciary, 86th Cong., 2d Sess. (1960); G. Sophar and L. Heilprin, The Determination of Legal Facts and Economic Guideposts with Respect to the Dissemination of Scientific and Educational Information as it is Affected by Copyright—A Status Report, Final Report, Prepared by The Committee to Investigate Copyright Problems Affecting Communication in Science and Education, Inc., for the U.S. Department of Health, Education, and Welfare, Project No. 70793 (1967); Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law to the House Comm. on the Judiciary, 87th Cong., 2d Sess. at 25–26 (1961); Project—New Technology and the Law of Copyright: Reprography and Computers, 15 U.C.L.A. L. Rev. 931 (1968); V. Clapp, Copyright—A Librarian's View, Prepared for the National Advisory Commission on Libraries, Association of American Libraries (1968); Schuster and Bloch, Mechanical Copyright, Copyright Law, and the Teacher, 17 Clev.-Mar. L. Rev. 299 (1968); "Report on Single Copies"—Joint Libraries Committee on Fair Use in Photocopying, 9 Copyright Soc'y Bull. 79 (1961–62); Breyer, "The Uneasy Case for Copyright: A Study of Copyright in Books Photocopies, and Computer Programs," 84 Harv. L. Rev. 281 (1970); Note, "Statutory Copyright Protection for Books and Magazines Against Machine Copying," 39 Notre Dame Lawyer 161 (1964); Note, Education and Copyright Law: An Analysis of the Amended Copyright Revision Bill and Proposals for Statutory Licensing and a Clearinghouse System," 56 Va. L. Rev. 664 (1970); Hattery and Bush (ed.), Reprography and Copyright Law (1964).

COWEN, *Chief Judge*, dissenting:

It is my opinion that our former Trial Judge James F. Davis fully and correctly resolved the difficult and perplexing issues presented by this case in his scholarly and well-reasoned opinion. I would therefore adopt his opinion, findings of fact, and recommended conclusions of law as a basis for a judgment by the court in favor of the plaintiff.

In its discussion of the grounds for the decision which rejected the trial judge's conclusions, the court has, in my opinion, unduly emphasized the facts that are favorable to the defendant and has given inadequate consideration to

other facts which led the trial judge to reach a contrary result. For these reasons, I am incorporating in this dissent those portions of the trial judge's opinion which I think are particularly pertinent to the grounds upon which the case has been decided. In view of the court's extensive discussion of the issues and its consideration of some matters not argued to the trial judge, I am supplementing his opinion with the material that follows.

As a preface to my disagreement with the court, I think it would be helpful to point out that this is not a case involving copying of copyrighted material by a scholar or his secretary in aid of his research, nor is it a case where a teacher has reproduced such material for distribution to his class. Also, it is not a case where doctors or scientists have quoted portions of plaintiff's copyrighted articles in the course of writing other articles in the same field. We are not concerned here with a situation in which a library makes copies of ancient manuscripts or worn-out magazines in order to preserve information. What we have before us is a case of wholesale, machine copying, and distribution of copyrighted material by defendant's libraries on a scale so vast that it dwarfs the output of many small publishing companies. In order to fill requests for copies of articles in medical and scientific journals, the NIH made 86,000 Xerox copies in 1970, constituting 930,000 pages. In 1968, the NLM distributed 120,000 copies of such journal articles, totalling about 1.2 million pages. As the trial judge correctly observed, this extensive operation is not only a copying of the copyrighted articles, it is also a reprinting by modern methods and publication by a very wide distribution to requesters and users.

I

Photographic Reproduction of Plaintiff's Journal Articles Is An Abridgement of the Copyright Owner's Exclusive Right To Copy

The majority maintains there is a "solid doubt" whether and how far the word "copy" in Section 1(a) of the 1909 Copyright Act applies to books and journals. The argument continues that the infringement of periodical articles can come only through "printing," "reprinting," or "publishing."

Certainly few things in the law are beyond all doubt or qualification. I think it is apparent, however, from the wording of the 1909 Act, and from the cases interpreting that Act, that Congress intended the word "copy" to apply to books and journals as well as other copyrightable materials. Section 1(a) of the 1909 Act gives the copyright proprietor the exclusive right to "print, reprint, publish, copy, and vend the copyrighted work." 17 U.S.C. § 1 (1970). It follows that copying of a substantial portion of the copyrighted work by someone other than the copyright owner would be an infringement.

I think the trial judge correctly concluded that there is nothing in the legislative history of the 1909 Act which indicates that a restrictive definition of the word "copy" was intended. A significant change in the 1909 Act was the elimination of sections 4964 and 4965 of the prior copyright statute, which it is claimed, are the source of the distinction between the copying of books and the copying of other copyrighted material.[1] By removing those two sections and by adopting the general classification of "copyrighted works" in Section 1(a) and a general listing of all copyrightable works in Section 5 of the 1909 Act, Congress obliterated the distinction, if there ever had been one, between the copying of books and the copying of other materials.[2]

As a result of the simple clarity in the phrasing of the copyright owner's exclusive rights in the 1909 Act, it is not surprising that numerous court decisions interpreting that Act have focused on the copying of copyrighted material (including books and other items of this type) as the infringing act. *See, e.g., Harold Lloyd Corp.* v. *Witwer*, 65 F. 2d 1, 16–19 (9th Cir. 1933); *King Features Syndicate* v. *Fleischer*, 299 F. 533, 535 (2d Cir. 1924).

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[1] These sections had been in the copyright law since 1831 and had been twice re-enacted. Act of February 3, 1831, ch. 16, §§ 6 and 7, 4 Stat. 436; Act of July 8, 1870, ch. 230, §§ 99 and 100, 16 Stat. 214; Act of March 3, 1891, ch. 565, §§ 4964 and 4965, 26 Stat. 1109.

[2] The trial judge observed that it was the intent of Congress in all the copyright acts to proscribe the unauthorized duplication of copyrighted works. The words used in the various statutes were simply attempts to define the then-current means by which duplication could be effected. I believe this is a fair statement, but it is not necessary to debate the statutory history in light of the changes in the 1909 Act.

I have not been able to find one decision since the 1909 Act which has held that the word "copy" in section 1(a) would not apply to the making of one or a number of copies of a book or other material of this type. The cases have simply not recognized the claimed distinction between copying and printing or publishing. For example, in *New York Tribune, Inc.* v. *Otis & Co.*, 39 F. Supp. 67 (S.D.N.Y. 1941), the court found the making of photostatic copies of plaintiff's newspaper editorial and masthead to be a "good cause of action on its face," and denied defendant's motion for summary judgment. *Id.* at 68. The defendant in that case had distributed the photocopies to a selected list of public officials, bankers, educators, economists and other persons. The court drew no distinction between printing, publishing, or copying. By comparison, the copying and distributing of the newspaper editorial and masthead in that case is very similar to the copying and distributing of the journal articles in the present action.[3]

Therefore, I do not think there is substantial doubt that the photocopying by defendant's libraries is a copy of the plaintiff's journal articles in violation of the copyright owner's exclusive right to copy or to multiply copies of his work under section 1(a). I can see no reason to draw a distinction between copying of "books" and copying of other materials when the distinction is expressly rejected on the face of the copyright statute, has not been observed in numerous cases applying the 1909 Act, and has no reasonable basis in light of the purposes of copyright protection.[4]

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[3] For cases involving the copying of segments from a copyrighted catalog by photographic reproduction, *see* Hedeman Products Corp. v. Tap-Rite *Prods.* Corp., 228 F. Supp. 630, 633–34 (D.N.J. 1964); R. R. Donnelley & Sons Co. v. Haber, 43 F. Supp. 456, 458–59 (E.D.N.Y. 1942).

[4] The fact that Dr. Putnam, the Librarian of Congress at the time of the 1909 Act, interpreted the word "copy" not to include library photoduplication is no indication that the Congress drafted the statute with this intent. The absence of any provision allowing library photoduplication in the statute or the legislative history indicates, as much as anything else, that Congress did not consider it to be exempt from the Act. The many efforts to amend the law to authorize photocopying by libraries provide a strong indication that existing law was not intended to grant this exemption to libraries. See n. 14, trial judge's opinion.

II

The Photocopying of Plaintiff's Copyrighted Articles Was Not Fair Use

1. Realizing the necessity for showing that the defendant's unauthorized copying of plaintiff's articles was both reasonable and insubstantial, the court relies heavily on policies which were adopted by the libraries in 1965. Although these policies were designed to limit the extent of copying that had been done in prior years, the trial judge's opinion and the findings of fact show the exceptions are routinely granted by the defendant's libraries, that there is no way to enforce most of the limitations, and that defendant is operating a reprint service which supplants the need for journal subscriptions.

In particular, the trial judge has, I think, clearly demonstrated that the claimed "single-copy-per-request" limitation is both illusory and unrealistic. He has found, and it is not disputed, that the libraries will duplicate the same article over and over again, even for the same user, within a short space of time. NLM will supply requesters photocopies of the same article, one after another, on consecutive days, even with knowledge of such facts. I find great difficulty in detecting any difference between the furnishing by defendant's libraries of ten copies of one article to one patron, which he then distributes, and giving each of ten patrons one copy of the same article. The damage to the copyright proprietor is the same in either case.

2. The law is well settled, and I believe not questioned by the court in this case, that under Section 3 of the Copyright Act, plaintiff's copyrights of the journals cover each article contained therein as fully as if each were individually copyrighted. Section 3 expressly mentions periodicals, and for the purpose of determining whether there has been infringement, each copyrightable component is to be treated as a complete work. *Markham* v. *A. E. Borden Co.*, 206 F. 2d 199, 201 (1st Cir. 1953).

It is undisputed that the photocopies in issue here were exact duplicates of the original articles; they were intended to be substitutes for and they served the same purpose as the original articles. They were copies of complete copyrighted

works within the meaning of Sections 3 and 5 of the Copyright Act. This is the very essence of wholesale copying and, without more, defeats the defense of fair use. The rule to be applied in such a situation was stated in *Leon V. Pacific Telephone & Telegraph Co.*, 91 F. 2d 484, 486 (9th Cir. 1937) as follows:

> Counsel have not disclosed a single authority, nor have we been able to find one, which lends any support to the proposition that wholesale copying and publication of copyrighted material can ever be fair use.

For other cases to the same effect, *see Public Affairs Associates, Inc.* v. *Rickover*, 284 F. 2d 262, 272 (D.C. Cir. 1960), *judgment vacated for insufficient record*, 369 U.S. 111 (1962); *Benny* v. *Loew's Inc.*, 239 F. 2d 532, 536 (9th Cir. 1956), *aff'd by an equally divided court sub nom., Columbia Broadcasting System, Inc.* v. *Loew's Inc.*, 356 U.S. 43 (1958); *Holdredge* v. *Knight Publishing Corp.*, 214 F. Supp. 921, 924 (S.D. Cal. 1963). *See also* M. Nimmer, *Nimmer on Copyright* § 145 at 650–51 (1973 ed.).

Although the majority states that the rule announced in the cases cited above is an "overbroad generalization, unsupported by the decisions and rejected by years of accepted practice," the court cites no decisions in support of its position.

3. I recognize that the doctrine of fair use permits writers of scholarly works to make reasonable use of previously copyrighted material by quotation or paraphrase, at least where the amount of copying is small and reliance on other sources is demonstrated. *See, e.g., Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Simms* v. *Stanton*, 75 F. 6, 13–14 (C.C.N.D. Cal. 1896). However, I think the basic error in the court's decision is its holding that the fair use privilege usually granted to such writers should be extended to cover the massive copying and distribution operation conducted by defendant's libraries. The articles are not reproduced by the libraries to enable them to write other articles in the same field. In fact, booksellers and licensed copiers of plaintiff's journals sell copies of journal articles to the same class of users and for the same purposes as the copies reproduced by defendant's libraries.

I do not believe that anyone would contend that the ultimate use of the purchased articles by scientists, doctors, or drug companies would permit the commercial concerns mentioned to reproduce copies without plaintiff's permission. In an effort to overcome this obstacle, the majority relies in part on the nature and function of the NIH and the NLM and the fact that the articles are reproduced and distributed free of charge. I do not know of any case which holds that an unauthorized reproduction which is made without profit amounts to fair use by the infringer, and there are decisions to the contrary.[8]

Moreover, as plaintiff has pointed out, almost every service provided by Government agencies is financed by appropriated funds and furnished without charge to the recipient. If Congress had intended to relieve Government agencies from liability for copyright infringement whenever the material is copied or otherwise reproduced without charge to the recipient, there would have been no need for the enactment of the 1960 Amendment, now 28 U.S.C. § 1498(b), which gives us jurisdiction of this action.

Defendant also argues that its libraries are entitled to the fair use privilege of scientists, researchers, or scholars, because the libraries act as their agent in making the photocopies at their request. This argument is so far-fetched that the majority balks at embracing it completely. It collides with reality. The libraries installed and operate the reproduction and distribution operation on their own initiative and without any kind of an agreement with the ultimate users of the copies. There is no showing that these alleged—and in the case of NLM generally unknown—principals have any say in the formulation of the policies and practices of the photocopying operation. The libraries decide, without consulting or obtaining the consent of the alleged principals, whether to loan the original of the journals or to provide

[8] It has been held that the copying or printing of something which has been lawfully copyrighted is an infringement "without any requirement that there be a sale or that profits be made from sale of the copies." Chappell & Co., Inc. v. Costa, 45 F. Supp. 554, 556 (S.D.N.Y. 1942). In Wihtol v. Crow, 309 F. 2d 777 (8th Cir. 1962), the First Methodist Church was found to be liable for a choral instructor's copying of a copyrighted song.

photocopies. The libraries are no more the agent of the users of the material than are the venders of plaintiff's magazines and the commercial concerns which are licensed by plaintiff to make and sell copies to doctors and scientists. The essential elements of agency are wholly lacking.

4. The trial judge found that it is reasonable to infer from the evidence that the extensive unauthorized copying of plaintiff's journal has resulted in some loss of revenue and serves to diminish plaintiff's potential market for the original articles. Since the inferences made by the trial judge may reasonably be drawn from the facts and circumstances in evidence, they are presumptively as correct as his findings of fact. *Bonnar* v. *United States*, 194 Ct. Cl. 103, 109, 438 F. 2d 540, 542 (1971). *See also Baumgartner* v. *United States*, 322 U.S. 665, 670 (1944); *Penn-Texas Corp.* v. *Morse*, 242 F. 2d 243, 247 (7th Cir. 1957). Accordingly, under the standards which we employ for reviewing the findings of our trial judges, I would adopt these findings. *Davis* v. *United States*, 164 Ct. Cl. 612, 616–17 (1964); *Wilson* v. *United States*, 151 Ct. Cl. 271, 273 (1960).

Although the court states that it rejects the trial determinations as to both actual and potential damage to plaintiff, I think the opinion shows that the court's conclusion is based primarily on its finding that plaintiff failed to prove actual damages. In so doing, the majority relies heavily on evidence that the plaintiff's profits have grown faster than the gross national product and that plaintiff's annual taxable income has increased. This evidence is irrelevant to the economic effects of photocopying the journals in this case, because these periodicals account for a relatively small percent of plaintiff's total business. Moreover, the extent of plaintiff's taxable income for the years mentioned does not reflect the effect of defendant's photocopying of plaintiff's journals, and particularly the effect it will have on the prospects for continued publication in the future.

By the very nature of an action for infringement, the copyright proprietor often has a difficult burden of proving the degree of injury. It is well established, however, that

proof of actual damages is not required, and the defense of fair use may be overcome where potential injury is shown. *See, e.g., Henry Holt & Co., Inc.* v. *Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 304 (E.D. Pa. 1938). As Professor Nimmer has stated, the courts look to see whether defendant's work "tends to diminish or prejudice the potential sale of the plaintiff's work." M. Nimmer, *Nimmer on Copyright* § 145 at 646 (1973 ed.).

The problem posed by library photocopying of copyrighted material has long been a subject of controversy. Several studies of this problem have pointed out that extensive photocopying by libraries is unfair because of its potential damage to the copyright owner. The trial judge has quoted from the reports of several of these studies.[6]

In a thorough and thoughtful discussion of the effects of reprography, prepared at the University of California, Los Angeles, and funded by the National Endowment for the Arts, it is stated:

> It has long been argued that copying by hand "for the purpose of private study and review" would be a fair use. Users are now asserting that machine copying is merely a substitute for hand copying and is, therefore, a fair use. But this argument ignores the economic differences between the two types of copying. Copying by hand is extremely time consuming and costly, and is not an economic threat to authors. *Viewing reprography as though it were hand copying, however, overlooks the effect of the total number of machine copies made. Few people hand copy, but millions find machine copying economical and convenient. Allowing individual users to decide that their machine copying will not injure the author and will thus be a fair use fails to take into account the true economic effect when thousands of such individual decisions are aggregated.*

The problem is vividly presented by the practice of

[6] *See* the trial judge's opinion for quotations from B. Varmer, Photoduplication of Copyrighted Material by Libraries, Study No. 15, Copyright Law Revision, Studies Prepared for the Senate Comm. on the Judiciary, 86th Cong., 2d Sess. 62–63 (1960); Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, House Committee Print, 87th Cong., 1st Sess. 25–26 (1961). M. Nimmer, *Nimmer on Copyright* § 145 at 653–54 (1973 ed.). *See also* Crossland, *The Rise and Fall of Fair Use: The Protection of Literary Materials Against Copyright Infringement by New and Developing Media*, 20 S. Car. L. Rev. 153, 154 (1968).

> the National Library of Medicine. The Library justifies its distribution of reprographic copies of journal articles to biomedical libraries (without permission of the copyright owner) on the basis of a 1939 understanding between publishers and libraries called the "Gentlemen's Agreement." Under this agreement photocopies are permitted whenever the user would have made a hand copy himself, the rationale being that no purchases of the author's work are displaced under these circumstances. When an individual would actually copy by hand, the theory is valid; there is no sound reason to force him to do the work. But many people obtain copies from the library who would not copy by hand, and who might in fact buy a copy of the work if they were unable to receive an inexpensive machine reproduction of it. Thus, the library interprets the Gentlemen's Agreement in its favor and thereby "justifies" a substantial amount of copying. (Emphasis supplied.) *Project, New Technology and the Law of Copyright: Reprography and Computers*, 15 U.C.L.A. L. Rev. 931, 951 (1968).

As the majority points out, one study, made in 1962, concluded that photocopying did not result in economic damage to publishers at that time: Fry & Associates, Survey of Copyrighted Material Reproduction Practices in Scientific and Technical Fields, 11 Bull. Cr. Soc. 69, 71 (1963). This study also stated:

> One situation was reported during the survey in which economic damage may occur. A prominent university library in a small town with several corporate research and development centers gives excellent service on its collection. This library felt that these corporate libraries are subscribing to only the minimum number of journals. They rely on the university to supply photocopies of other material.
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> * * * * *
>
> This is the one clear-cut example disclosed during the survey of dilution of the publishers' circulation market. *Id.* at 119.

Indeed, this example is very nearly the situation presented by this case. Government institutions, medical schools, hospitals, research foundations, drug companies, and individual physicians are supplementing their collections, if they

subscribe to any journals, by acquiring free photocopies of articles from the NLM.[7]

In addition to the conclusions of those who have studied the problem extensively, there are other facts and circumstances in this record which I think amply support the views of the trial judge that the system used by defendant's libraries for distributing free copies of plaintiff's journal articles attracts some potential purchasers of plaintiff's journals.

Subscription sales provide most of the revenue derived from the marketing of plaintiff's journals. It is important to remember that each of plaintiff's journals caters to and serves a limited market. Plaintiff's share of the profits from these journals has varied from less than $1,000 to about $7,000 annually.[8] In the context of rising costs of publication, an inability to attract new customers, and the loss of even a small number of old subscribers may have a large detrimental effect on the journals. A representative of William & Wilkins Company testified that in recent years there have been journals that have failed, and in the opinion of those at Williams & Wilkins, photocopying has played a role in these failures.[9] The majority relies on the fact that subscriptions for the four journals in this case have shown a general increase over the last five years, but two of the journals, *Medicine* and *Phar-*

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[7] It should be noted that the Fry survey was made when photocopying was not as prominent as it is today. Even at that time, the Fry Report notes that larger publishers (who were photocopied most heavily) complained about the effects of photocopying. Fry Report at 86–87. Secondly, the Fry Report operates on the dubious assumption that in most cases the photocopy serves as a substitute for loaning the original material and does no more damage than would loaning of the original material.

In addition to the Fry Report, the majority cites a statement by Dan Lacy, Managing Director, American Book Publisher's Council, to the effect that photocopying is undertaken in lieu of manual note taking, typing, or handwriting a copy, and in lieu of a library loan rather than in lieu of buying a copy. We can hardly expect a representative of an organization of book publishers to be an expert on the problems of journal publishers. Library photocopying of books does not pose the same threat to a book publisher as photocopying of journal articles does to its publisher. Rarely are books photocopied completely. At present, there appears to be no competition for the consumer market between libraries and book publishers.

[8] For example, in 1968, profit from *Pharmacological Reviews* was $1,154.44 (on sales of about $40,000). The profit was divided, $1,039 to the American Society for Pharmacology and Experimental Therapeutics and $115.44 to plaintiff. In 1969, net income from *Gastroenterology* was $21,312 (on sales of about $245,000) and $11,532.35 of that amount was offset by losses the previous year leaving a balance of $9,779.73. The balance was split between plaintiff and the American Gastroenterological Association, plaintiff getting $4,889.86.

[9] Tr. at 73.

macological Reviews, have shown a slight decrease in subscriptions from 1968 to 1969. In addition, the *Journal of Immunology* showed losses in the period prior to 1961; *Gastroenterology* showed losses in 1967 and 1968; *Pharmacological Reviews* showed a loss in 1969. There is no evidence to show specifically whether any particular instance or instances of unauthorized photocopying of plaintiff's journals has or has not resulted in the loss of revenue to plaintiff. However, I think the record, as a whole, supports the determination of the trial judge that the photocopying in this case has had a tendency to diminish plaintiff's markets in the past.

The NLM publishes a monthly indexed catalog of journal articles in medicine and related sciences entitled "Index Medicus." The index is widely distributed to medical libraries, research centers, schools, hospitals, and physicians. The catalog announces its new publications and acquisitions and thus advertises to the medical and scientific community, which constitutes plaintiff's market, that certain articles are available free of charge in the form of a photocopy.

At the present time, the NIH purchases only two subscriptions to plaintiff's journals. If nothing else, it would certainly need more than the two copies to meet the requests of the large in-house staff. Although it has been argued that the photocopies are merely a substitute for the loan of an original and does no more harm than the loan of the original material, I think this argument is fallacious. One copy of the original material could not possibly be loaned to as many requesters as the numerous photocopies, the competitive effect of which is much greater. Also, the photocopies are not required to be returned and become the property of the possessor. They can be marked, cut into segments, placed in the files, and otherwise put to uses that would be impossible with a loan of the original. While the library may look at the giving of a photocopy as a substitute for a loan, the user and would-be purchaser gets an exact copy of the original article which is a substitute for a purchased copy.

One of the new sources of income to publishers is the supplying of back issues or providing copies of such issues. When plaintiff receives a request for an out-of-print article, the customer is generally referred to the Institute of Scientific Information, which is licensed by plaintiff to make the photo-

copies. If the same articles can be obtained from the NLM without charge, it seems obvious that the supplying of free copies by the defendant's libraries will tend to diminish plaintiff's income from this source. NLM reproduces and supplies copies of journal articles to the patrons of other libraries. Therefore, the libraries who make the requests do not have to buy subscriptions for the use of their own patrons.

III

Foreign Laws Do Not Justify an Exemption From the Copyright Laws

The court relies to some extent on the copyright laws of the United Kingdom, New Zealand, Denmark, Finland, Italy, and other countries. The plaintiff says there are many differences between our copyright laws and those of other countries, and plaintiff does not agree that the defendant would be exempt from liability under the statutes of some of the countries named. However, we need not delve into the details of the copyright legislation of these foreign countries. There is a shorter answer to the court's reliance on foreign laws. Unlike the legislative bodies of these countries, the Congress has not yet changed the Copyright Act of 1909 to permit the same kind of copying by the NIH and the NLM. If the time has come when the defendant's libraries should be exempted from the provisions of the Copyright Act to the extent permitted by the court's decision, the exemption should be provided by legislative action rather than by judicial legislation.

IV

A Judgment for Plaintiff Will Not Injure Medicine and Medical Research

The court has bottomed its decision to a very large extent on its finding, which is not disputed, that medical science would be seriously hurt if the photocopying by defendant's libraries is entirely stopped. But the court goes further and concludes that a judgment for plaintiff would lead to this result. It is not altogether clear to me how the court arrives

at the second conclusion, and I think it is based on unwarranted assumptions.

The plaintiff does not propose to stop such photocopying and does not desire that result. What plaintiff seeks is a reasonable royalty for such photocopying and, in this case, a recovery of reasonable compensation for the infringement of its copyrights. Plaintiff has established a licensing system to cover various methods of reproducing its journal articles, including reproduction by photocopying. One of the licensees is a Government agency, and on several occasions plaintiff has granted requests from Government agencies and others for licenses to make multiple copies (Finding 36). In May 1967, the photocopying of plaintiff's journal articles was monitored by NLM for a 90-day period which was judged to be a representative sample. As the trial judge has shown, NLM found that it would have paid plaintiff from $250 to $300 if it had granted plaintiff's request for royalty payments. The Director of NLM testified that this was, in his opinion, a surprisingly small sum. He also testified (Part III, trial judge's opinion) that the payment of a royalty to plaintiff for photocopying "has nothing to do with the operation of the library in the fulfillment of * * * [its] function. It is an economic and budgetary consideration and not a service-oriented kind of thing." This is the only direct testimony that I have found on how the payment of royalties for photocopying will affect the functions of the library, and it gives no indication or initimation that the payment of royalties to plaintiff will force NLM to cease the photocopying.

The court has laid heavy emphasis on the public interest in maintaining a free flow of information to doctors and scientists, and on the injury that might result if this flow should be stopped. However, there is another facet to the public interest question which is presented in this case. The trial judge put it well in his statement:

> The issues raised by this case are but part of a larger problem which continues to plague our institutions with ever-increasing complexity—how best to reconcile, on the one hand, the rights of authors and publishers under the copyright laws with, on the other hand, the technological improvements in copying techniques and the

> legitimate public need for rapid dissemination of scientific and technical literature. (Part III, trial judge's opinion)

In enacting the 1909 Act, the House Committee said:

> The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings * * * but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings. H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909).

In *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954), the Supreme Court emphasized that the copyright protection given to authors and publishers is designed to advance public welfare, stating:

> "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. * * *" However, it is "intended definitely to grant valuable, enforceable rights to authors, publishers, etc. * * *"
>
> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts."

In order to promote the progress of science, not only must authors be induced to write new works, but also publishers must be induced to disseminate those works to the public. This philosophy has guided our country, with limited exceptions, since its beginning, and I am of the opinion that if there is to be a fundamental policy change in this system, such as a blanket exception for library photocopying, it is for the Congress to determine, not for the courts. The courts simply cannot draw the distinctions so obviously necessary in this area.

The court recognizes that the solution which it has undertaken to provide in this case is preeminently a problem for Congress which should decide how much photocopying should be allowed, what payments should be made to the copyright owners, and related questions. Nowhere else in its opinion is the court on more solid ground than when it

declares that the "choices involve economic, social, and policy factors which are far better sifted by a legislature. The possible intermediate solutions are also of the pragmatic kind legislatures, not courts, can and should fashion." In spite of this obviously correct statement, the court has bridged the gap which the inaction of Congress has left in the Copyright Act of 1909.

I agree with the court that we have no jurisdiction to order a copyright owner to institute a licensing system if he does not wish to do so, but I think we are equally powerless to assume the congressional role by granting what amounts to a blanket exemption to defendant's libraries. Without too much difficulty, however, we can determine the amount of just compensation that is due plaintiff for the infringement of its copyrights. If that should be done, it may very well lead to a satisfactory agreement between the parties for a continuation of the photocopying by defendant upon the payment of a reasonable royalty to plaintiff.

The following portions of the trial judge's opinion are made a part of this dissent:

I

Plaintiff, though a relatively small company, is a major publisher of medical journals and books. Plaintiff publishes 37 journals, dealing with various medical specialties. The four journals in suit are *Medicine*, *Journal of Immunology*, *Gastroenterology*, and *Pharmacological Reviews*. *Medicine* is published by plaintiff for profit and for its own benefit. The other three journals are published in conjunction with specialty medical societies which, by contract, share the journals' profits with plaintiff. The articles published in the journals stem from manuscripts submitted to plaintiff (or one of the medical societies) by physicians or other scientists engaged in medical research. The journals are widely disseminated throughout the United States (and the world) in libraries, schools, physicians' offices, and the like. Annual subscription prices range from about $12 to $44; and, due to the esoteric nature of the journals' subject matter, the number of annual subscriptions is relatively small, ranging from about 3,100 (*Pharmacological Reviews*) to about 7,000 (*Gastroenterology*). Most of the revenue derived from the

journals comes from subscription sales, though a small part comes from advertising.[4] The journals are published with notice of copyright in plaintiff's name. The notice appears at the front of the journal and sometimes at the beginning of each article. After publication of each journal issue (usually monthly or bimonthly) and after compliance with the requisite statutory requirements, the Register of Copyrights issues to plaintiff certificates of copyright registration.

NIH, the Government's principal medical research organization, is a conglomerate of institutes located on a multiacre campus at Bethesda, Maryland. Each institute is concerned with a particular medical specialty, and the institutes conduct their activities by way of both intramural research and grants-in-aid to private individuals and organizations. NIH employs over 12,000 persons—4,000 are science professionals and 2,000 have doctoral degrees. To assist its intramural programs, NIH maintains a technical library. The library houses about 150,000 volumes, of which about 30,000 are books and the balance scientific (principally medical) journals. The library is open to the public, but is used mostly by NIH in-house research personnel. The library's budget for 1970 was $1.1 million.

The NIH library subscribes to about 3,000 different journal titles, four of which are the journals in suit. The library subscribes to two copies of each of the journals in suit. As a general rule, one copy stays in the library reading room and the other copy circulates among interested NIH personnel. Demand by NIH research workers for access to plaintiff's journals (as well as other journals to which the library subscribes) is usually not met by in-house subscription copies. Consequently, as an integral part of its operation, the library runs a photocopy service for the benefit of its research staff. On request, a researcher can obtain a photocopy of an article from any of the journals in the library's collection. Usually, researchers request photocopies of articles to assist them in their on-going projects; sometimes photocopies are requested simply for background reading. In any event, the library does not monitor the reason for requests or the use to which

[4] E.g., the November 1956 issue of Medicine has 86 pages, four of which carry commercial product advertising. The August 1965 issue of Journal of Immunology has 206 pages, nine of which carry commercial product advertising.

the photocopies are put. The photocopies are not returned to the library; and the record shows that, in most instances, researchers keep them in their private files for future reference.

Four regularly assigned employees operate the NIH photocopy equipment. The equipment consists of microfilm cameras and Xerox copying machines. In 1970, the library photocopy budget was $86,000 and the library filled 85,744 requests for photocopies of journal articles (including plaintiff's journals), constituting about 930,000 pages. On the average, a journal article is 10 pages long, so that in 1970, the library made about 93,000 photocopies of articles.

NLM is located on the Bethesda campus of NIH. NLM was formerly the Armed Forces Medical Library. In 1956, Congress transferred the library from the Department of Defense to the Public Health Service (renaming it the National Library of Medicine), and declared its purpose to be "* * * to aid the dissemination and exchange of scientific and other information important to the progress of medicine and to the public health * * *." 42 U.S.C. § 275 (1970). NLM is a repository of much of the world's medical literature. NLM is in essence a "librarians' library." As part of its operation, NLM cooperates with other libraries and like research-and-education-oriented institutions (both public and private) in a so-called "interlibrary loan" program. Upon request, NLM will loan to such institutions, for a limited time, books and other materials in its collection. In the case of journals, the "loans" usually take the form of photocopies of journal articles which are supplied by NLM free of charge and on a no-return basis. The term "loan" therefore is a euphemism when journal articles are involved. NLM's loan policies are fashioned after the General Interlibrary Loan Code, which is a statement of self-imposed regulations to be followed by all libraries which cooperate in interlibrary loaning. The Code provides that each library, upon request for a loan of materials, shall decide whether to loan the original or provide a photoduplicate. The Code notes that photoduplication of copyrighted materials may raise copyright infringement problems, particularly with regard to "photographing *whole issues* of periodicals or books with *current copyrights*, or in making *multiple copies* of a publication." [Emphasis in original text.] NLM, there-

fore, will provide only one photocopy of a particular article, per request, and will not photocopy on any given request an entire journal issue. NLM, as well as other libraries, justifies this practice on the basis of a so-called "gentlemen's agreement," written in 1935 by the National Association of Book Publishers and the Joint Committee on Materials for Research (representing the libraries), which states in part, "A library * * * owning books or periodical volumes in which copyright still subsists may make and deliver a single photographic reproduction * * * *of a part thereof* to a scholar representing in writing that he desires such reproduction in lieu of loan of such publication or in place of manual transcription and solely for the purposes of research * * *." [Emphasis supplied.] Each photocopy reproduced by NLM contains a statement in the margin, "This is a single photostatic copy made by the National Library of Medicine for purposes of study or research in lieu of lending the original."

In 1968, a representative year, NLM received about 127,000 requests for interlibrary loans. Requests were received, for the most part, from other libraries or Government agencies. However, about 12 percent of the requests came from private or commercial organizations, particularly drug companies. Some requests were for books, in which event the book itself was loaned. Most requests were for journals or journal articles; and about 120,000 of the requests were filled by photocopying single articles from journals, including plaintiff's journals. Usually, the library seeking an interlibrary loan from NLM did so at the request of one of its patrons. If the "loan" was made by photocopy, the photocopy was given to the patron who was free to dispose of it as he wished. NLM made no effort to find out the ultimate use to which the photocopies were put; and there is no evidence that borrowing libraries kept the "loan" photocopies in their permanent collections for use by other patrons.

Defendant concedes that within the pertinent accounting period, NLM and the NIH library made at least one photocopy of each of eight articles (designated by plaintiff as the Count I-to-Count VIII articles) from one or more of the four journals in suit. Defendant also concedes that plaintiff is the record owner of copyright registrations on the journals. That would appear to end the matter in plaintiff's favor, for

§ 1 of the copyright statute (17 U.S.C.) says that the copyright owner "* * * shall have the exclusive right: (a) to print, reprint, publish, copy and vend the copyrighted work * * *"; and § 3 of the statute says that, "* * * [t]he copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title." Simply stated, this means that each article in plaintiff's journals is protected from infringement to the same extent as the entire journal issue. *Advertisers Exch., Inc.* v. *Laufe*, 29 F. Supp. 1 (W.D. Pa. 1939); *King Features Syndicate* v. *Fleischer*, 299 F. 533 (2d Cir. 1924).[5]

The noninfringement defense

Defendant contends that its acts of copying do not violate the copyright owner's exclusive right "to copy" the copyrighted work as provided by 17 U.S.C. § 1. The argument is that with respect to books and periodicals, the act of making single copies (*i.e.*, one copy at a time) is not, in itself, sufficient to incur liability; that the "copying," to be actionable, must include "printing" (or "reprinting") and "publishing" of *multiple* copies of the copyrighted work. The argument is bottomed on analysis of the copyright laws as they have evolved from 1790 to the present.[5] The early laws distinguished "copying" from "printing," "reprinting," and "publishing," and provided that the copyright in books is infringed by "printing," "reprinting" and "publishing" while the copyright in other works (*e.g.*, photographs, paintings, drawings, etc.) is infringed by "copying." The 1909 Copyright Act obliterated any such distinction. It provides in § 5 a list of all classes of copyrightable subject matter (in-

[4] One argument made by defendant to justify the copying of single articles from plaintiff's journals is that each article is but "part" of a journal issue, which in turn is but "part" of a journal volume; and, accordingly, defendant says, its libraries have not copied an "entire" copyrighted work. Section 3 of 17 U.S.C. fully meets that argument, for it is undisputed that plaintiff could publish and seek copyright registration on each article separately. As stated in H.R. Rep. No. 2222, 60th Cong., 2d Sess. 10 (1909):

> Section 3 [of the Copyright Act] does away with the necessity of taking a copyright on the contributions of different persons included in a single publication * * *.

[5] Congress enacted the first copyright statute in 1790 (Act of May 31, 1790, ch. 15, 1 Stat. 124). Thereafter, the statute was revised from time to time, notably in 1802, 1831, 1870, and 1891. In 1909, the present statute was passed (Act of March 4, 1909, ch. 320, 35 Stat. 1075) and later was codified as 17 U.S.C. (Act of July 30, 1947, 61 Stat. 652).

cluding books and periodicals), and says in § 1 that the owner of copyright shall have the exclusive right "to print, reprint, publish, copy and vend *the copyrighted work*" [emphasis supplied]. Thus, the 1909 Act, unlike the earlier statutes, does not expressly say which of the proscribed acts of § 1 apply to which classes of copyrightable subject matter of § 5. Defendant says that to be consistent with the intent and purpose of earlier statutes, the "copying" proscription of § 1 should not apply to books or periodicals; rather, only the proscribed acts of "printing," "reprinting" and "publishing" should apply to books and periodicals.

Defendant's argument is not persuasive and, in any event, is irrelevant. It is clear from a study of all the copyright statutes from 1790 to date that what Congress has sought to do in every statute is to proscribe unauthorized *duplication* of copyrighted works. The words used in the various statutes to define infringing acts (*i.e.*, printing, reprinting, copying, etc.) were simply attempts to define the then-current means by which duplication could be effected. It is reasonable to infer that in 1909, when Congress included "copying" in the list of proscribed acts applicable to books and periodicals (as well as copyrightable subject matter in general), it did so in light of the fact that new technologies (*e.g.*, photography) made it possible to duplicate books and periodicals by means other than "printing" and "reprinting." The legislative history of the 1909 Act says little, one way or the other, about the matter.[9] Nevertheless, §§ 1 and 5 are plain and unambiguous on their face; and the Supreme Court held as recently as 1968, in *Fortnightly Corp.*, *supra* at 394:

> * * * § 1 of the [Copyright] Act enumerates several "rights" that are made "exclusive" to the holder of the copyright. If a person, without authorization from the copyright holder, puts a copyrighted work to a use *within the scope of one of these "exclusive rights," he infringes the copyright.* [Emphasis supplied.]

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[9] H.R. Rep. No. 2222, 60th Cong., 2d Sess. 4 (1909) states:

> Subsection (a) of section 1 adopts without change the phraseology of section 4952 of the Revised Statutes, and this, with the insertion of the word "copy," practically adopts the phraseology of the first copyright act Congress ever passed—that of 1790. Many amendments of this were suggested, but the committee felt that it was safer to retain without change the old phraseology which has been so often construed by the courts.

See also the 1961 Register's Report, wherein it is noted at 21–22:

> * * * as several courts have observed, the right embraced in the repetitive terms of section 1(a) is the two-fold right to make and publish copies.
>
> This right is the historic basis of copyright and pertains to *all* categories of copyrighted works. * * * [Emphasis supplied.]

The burden, therefore, is on defendant to show that Congress intended the statute to mean something other than what it plainly says. Defendant has not carried that burden.

It is also pertinent that the courts have liberally construed the 1909 Act to take into account new technologies by which copyrighted works can be duplicated, and thus infringed. In *Fortnightly Corp.*, *supra* at 395–96, the Court, in dealing with copyright infringement relating to television, said:

> In 1909, radio itself was in its infancy, and television had not been invented. *We read the statutory language of 60 years ago in the light of drastic technological change.* [Emphasis supplied.]

To the same effect is *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. 2d 411 (6th Cir. 1925), *cert. denied*, 269 U.S. 556, which stated at 411:

> * * * the statute may be applied to new situations not anticipated by Congress, if, fairly construed, such situations come within its intent and meaning. Thus it has been held both in this country and England that a photograph was a copy or infringement of a copyrighted engraving under statutes passed before the photographic process had been developed. [citations omitted] While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries.

Furthermore, defendant's argument that it may "copy," short of "printing," "reprinting" and "publishing," is irrelevant under the facts of this case. NLM and the NIH library did not merely "copy" the articles in suit; they, in effect, "reprinted" and "published" them. "Printing" and "reprinting" connote making a duplicate original, whether by printing press or a more modern method of duplication. *Macmillan Co.* v. *King*, 223 F. 862 (D. Mass. 1914); M. NIMMER,

COPYRIGHT § 102 (1971 ed.). "Publishing" means disseminating to others, which defendant's libraries clearly did when they distributed photocopies to requesters and users. *Macmillan Co., supra;* M. NIMMER, COPYRIGHT § 104 (1971 ed.).

Defendant's contention that its libraries make only "single copies" of journal articles, rather than multiple copies, is illusory and unrealistic. Admittedly, the libraries, as a general rule, make only one copy per request, usually for different users. But the record shows that the libraries duplicate particular articles over and over again, sometimes even for the same user within a short timespan. *E.g.*, the NIH library photocopied the Count I article three times within a 3-month period, two of the times for the same requester; and it copied the Count IV and Count V articles twice within a 2-month period, albeit for different users. The record also shows that NLM will supply to requesters photocopies of the same article, one after the other, on consecutive days, even with knowledge of such facts. In short, the libraries operate comprehensive duplication systems which provide every year thousands of photocopies of articles, many of which are copies of the same article; and, in essence, the systems are a reprint service which supplants the need for journal subscriptions. The effects of this so-called "single copying" practice on plaintiff's legitimate interests as copyright owner are obvious. The Sophar and Heilprin report, at 16, puts it in terms of a colorful analogy: "Babies are still born one at a time, but the world is rapidly being overpopulated."

The "fair use" defense

Defendant contends that its copying comes under the doctrine of "fair use" of copyrighted works. "Fair use," a judicially-created doctrine, is a sort of "rule of reason" applied by the courts as a defense to copyright infringement when the accused infringing acts are deemed to be outside the legitimate scope of protection afforded copyright owners under 17 U.S.C. § 1. What constitutes "fair use" cannot be defined with precision. Much has been written about the doctrine, particularly its rationale and scope. *See, e.g.*, A. LATMAN, FAIR USE OF COPYRIGHTED WORKS, STUDY No. 14, COPYRIGHT LAW REVISION, STUDIES PREPARED FOR SENATE COMM. ON THE JUDICIARY, 86th Cong., 2d Sess. (1960); Comment, *Copyright*

Fair Use—Case Law and Legislation, 1969 DUKE L.J. 73; S. COHEN, FAIR USE AND THE LAW OF COPYRIGHT, ASCAP COPYRIGHT LAW SYMPOSIUM (No. 6) 43 (1955); W. Jensen, *Fair Use: As Viewed by the "User,"* 39 DICTA 25 (1962); L. Yankwich, *What Is Fair Use?*, 22 U. CHI. L. REV. 203 (1954); Note, *Fair Use: A Controversial Topic in the Latest Revision of Our Copyright Law*, 34 U. CIN. L. REV. 73 (1965); M. NIMMER, COPYRIGHT § 145 (1971 ed.); SOPHAR & HEILPRIN REPORT at 15; R. HEEDHAM, TAPE RECORDING, PHOTOCOPYING AND FAIR USE, ASCAP COPYRIGHT LAW SYMPOSIUM (No. 10) 75 (1959); Crossland, *The Rise and Fall of Fair Use: The Protection of Literary Materials Against Copyright Infringement by New and Developing Media*, 20 S. CAR. L. REV. 153 (1968). Some courts have held that the doctrine is but an application of the principle *de minimis non curat lex* and, as plaintiff puts it, "comes into play only when a relatively small amount of copying takes place." Principal factors considered by the courts in deciding whether a particular use of a copyrighted work is a "fair use" are (a) the purpose of the use, (b) the nature of the copyrighted work, (c) the amount and substantiality of the material used in relation to the copyrighted work as a whole, and (d) the effect of the use on a copyright owner's potential market for his work.[10] While these criteria are interrelated and may vary in relative significance, the last one, *i.e.*, the competitive character of the use, is often the most important. *E.g.*, it has been held "fair use" to copy excerpts from literary works for purposes of criticism or review (*Loew's, Inc.* v. *CBS, Inc.*, 131 F. Supp. 165, 105 USPQ 302 (S.D. Cal. 1955), *aff'd sub nom. Benny* v. *Loew's, Inc.*, 239 F. 2d 532, 112 USPQ 11 (9th Cir. 1956), *aff'd by an equally divided Court*, 356 U.S. 43 (1958)); or to copy portions of scholarly works (*Greenbie* v. *Noble, supra; Holdredge* v. *Knight Publishing Corp.*, 214 F. Supp. 921, 136 USPQ 615 (S.D. Cal. 1963)). However, it is not "fair use" to copy substantial portions of a copyrighted work when the new work is a substitute for, and diminishes the potential market for, the original. *Hill* v.

[10] H.R. Rep. No. 83, 90th Cong., 1st Sess. (1967), which relates to revision of the copyright laws, notes that these factors are the ones used by the courts. At 29–37, there is a detailed discussion of "fair use" as applicable to photocopying for educational purposes.

Whalen & Mc tell, Inc., 220 F. 359 (S.D.N.Y. 1914); *Folsom* v. *Marsh*, 9 F. Cas. 343 (D. Mass. 1841). And it has been held that wholesale copying of a copyrighted work is never "fair use" (*Leon* v. *Pacific Tel. & Tel. Co.*, 91 F. 2d 484, 34 USPQ 237 (9th Cir. 1937); *Public Affairs Associates, Inc.* v. *Rickover*, 284 F. 2d 262, 127 USPQ 231 (D.C. Cir. 1960), *vacated and remanded*, 369 U.S. 111 (1962)), even if done to further educational or artistic goals and without intent to make profit. *Wihtol* v. *Crow*, 309 F. 2d 777, 135 USPQ 385 (8th Cir. 1962).

Whatever may be the bounds of "fair use" as defined and applied by the courts, defendant is clearly outside those bounds. Defendant's photocopying is wholesale copying and meets none of the criteria for "fair use." The photocopies are exact duplicates of the original articles; are intended to be substitutes for, and serve the same purpose as, the original articles; and serve to diminish plaintiff's potential market for the original articles since the photocopies are made at the request of, and for the benefit of, the very persons who constitute plaintiff's market. Defendant says, nevertheless, that plaintiff has failed to show that it has been harmed by unauthorized photocopying; and that, in fact, plaintiff's journal subscriptions have increased steadily over the last decade. Plaintiff need not prove actual damages to make out its case for infringement. *Macmillan Co.*, *supra*. Section 1498 of title 28 U.S.C. provides for payment of "reasonable and entire compensation * * * including minimum statutory damages as set forth in section 101(b) of title 17, United States Code." *See Brady* v. *Daly*, 175 U.S. 148 (1899); *F. W. Woolworth & Co.* v. *Contemporary Arts, Inc.*, 344 U.S. 228 (1952). M. NIMMER, COPYRIGHT § 154 (1971 ed.). Moreover, damage may be inferred in this case from the fact that the photocopies are intended to supplant the original articles. While it may be difficult (if not impossible) to determine the number of subscription sales lost to photocopying, the fact remains that each photocopy user is a potential subscriber, or at least is a potential source of royalty income for licensed copying. Plaintiff has set up a licensing program to collect royalties for photocopying articles from its journals; and among the licensees have been libraries, including a

Government library.[11] Also, there is evidence that one subscriber canceled a subscription to one of plaintiff's journals because the subscriber believed the cost of photocopying the journal had become less than the journal's annual subscription price; and another subscriber canceled a subscription, at least in part because library photocopies were available. Loss of subscription (or photocopying royalty) income is particularly acute in the medical journal field. The record shows that printing preparation costs are 50–65 percent of total cost of publication and that the number of subscriptions is relatively small. This simply means that any loss of subscription sales (or royalty income) has the effect of spreading publication costs over fewer copies, thus driving up steeply the unit cost per copy and, in turn, subscription prices. Higher subscription prices, coupled with cheap photocopying, means probable loss of subscribers, thus perpetuating a vicious cycle which can only bode ill for medical publishing.

Defendant's amici fear that a decision for plaintiff will be precedent for plaintiff's seeking injunctions against non-Government libraries, pursuant to 17 U.S.C. § 101(a), thereby interfering with the free flow of technical and scientific information through library photocopying. On the basis of this record and representations made by plaintiff's personnel and counsel, that fear does not appear to be justified. Plaintiff does not seek to *enjoin* any photocopying of its journals. Rather, it merely seeks a reasonable royalty therefor.[12] Its licensing program would so indicate for, as far as the record shows, plaintiff will grant licenses to anyone at a reasonable royalty. No doubt, plaintiff would prefer that all of its journal users be subscribers. However, plaintiff recognizes that this is unrealistic. Some articles in its journals are in greater demand than others, and many journal users will not consider

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[11] There is no agreement, even among libraries and Government agencies, of what constitutes "fair use" in institutionalized photocopying. The Library of Congress will not photocopy copyrighted materials without permission of the copyright owners. Many other libraries follow the General Interlibrary Loan Code and engage in "single copy" photocopying. The U.S. Office of Education, through its Education Resources Information Center (ERIC) makes available current educational and research-related materials. ERIC will not copy copyrighted materials without permission of the copyright owner. See Sophar and Hellprin report at 39–46.

it economically justifiable to subscribe to a journal simply to get access to a few articles. Implicit in plaintiff's licensing program, therefore, is the idea that it is in the best interest of all concerned that photocopying proceed without injunction, but with payment of a reasonable fee. That would appear to be a logical and commonsense solution to the problem, not unlike the solution provided by the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) in the field of music and the performing arts. For a description of how ASCAP and BMI operate in a context similar to this one, see *Hearings on H.R. 4347 and other bills before Subcomm. No. 3, House Comm. on the Judiciary, 89th Cong.*, 1st Sess. 194, 203 (1965); Finkelstein, ASCAP *as an Example of the Clearing House System in Operation*, 14 COPYRIGHT SOC'Y BULL. 2 (1966).

Defendant says that photocopying by NLM and the NIH library is "reasonable and customary" because it complies with a longstanding practice of libraries to supply photocopies of parts of scientific works to persons engaged in scholarly research, and is consistent with the terms of the "gentlemen's agreement," earlier noted. The "gentlemen's agreement," drafted in 1935, was the product of meetings and discussions between representatives of the book publishing industry and libraries. The representatives were interested in working out a practical accommodation of the conflict between (a) the legitimate interests of copyright owners not to have their works copied without compensation and (b) the needs of scholars and research workers for copies of parts of copyrighted works for private use in pursuit of literary or scientific investigation. The "agreement" was, in effect, a promise by the book publishers not to interfere

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[13] In his opening statement at trial, plaintiff's counsel said (emphasis supplied):

> The case has nothing to do with the stopping of photocopying. The Commissioner knows that an injunction is not available in this court, *nor is plaintiff, in any case, seeking to curtail this use of its articles.*

Similarly, William M. Passano, plaintiff's Chairman of the Board, stated in a hearing before a Senate committee:

> We feel that it is unrealistic and not in the public interest to consider restricting in any way the use of photocopying devices. They serve a useful purpose in the dissemination of knowledge. Since we, as publishers, are in that business, we certainly don't want to see the spread of knowledge curtailed.
>
> To us the only solution to the problem is a simple system of royalty payments with a minimum of red tape. • • • [Hearings on Copyright Law Revision before the Patents, Trademarks and Copyrights Subcomm. of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 976 (1967).]

with library photocopying under three conditions: (i) the library must warn the person for whom the photocopy is made that he is liable for any copyright infringement by misuse (presumably by making further photocopies), (ii) the photocopying must be done without profit to the library, and (iii) the amount copied must not be so substantial as to constitute an infringement. The third condition is implicit in the "agreement" which says:

> While the right of quotation without permission is not provided in law, the courts have recognized the right to a "fair use" of book quotations, the length of a "fair" quotation being dependent upon the type of work quoted from and the "fairness" to the author's interest. *Extensive quotation is obviously inimical to the author's interest.* * * * *It would not be fair to the author or publisher to make possible the substitution of the photostats for the purchase of a copy of the book itself either for an individual library or for any permanent collection in a public or research library. Orders for photocopying which, by reason of their extensiveness or for any other reasons, violate this principle should not be accepted.* [Emphasis supplied.]

The "gentlemen's agreement" does not have, nor has it ever had, the force of law with respect to what constitutes copyright infringement or "fair use." So far as this record shows, the "agreement" has never been involved in any judicial proceedings. Nevertheless, the "agreement" is entitled to consideration as a guide to what book publishers and libraries considered to be "reasonable and customary" photocopying practices in the year 1935. It has little significance, however, to this case. The agreement was drafted on behalf of a book publishers' organization which is now defunct and to which plaintiff never belonged. In fact, it appears that no periodical publishers were represented in the organization at the time the agreement was drafted; and, consequently, the "agreement" cannot speak for their interests or problems. See the Varmer study at 51, n. 9. Furthermore, the "agreement" was drafted at a time when photocopying was relatively expensive and cumbersome; was used relatively little as a means of duplication and dissemination; and posed no substantial threat to the potential market for copyrighted works. Beginning about 1960, photocopying changed char-

acter. The introduction to the marketplace of the office copying machine made photocopying rapid, cheap and readily available. The legitimate interests of copyright owners must, accordingly, be measured against the changed realities of technology. Professor Nimmer in his treatise COPYRIGHT capsules the point at 653:

> Both classroom and library reproduction of copyrighted materials command a certain sympathy since they involve no commercial exploitation and more particularly in view of their socially useful objectives. *What this overlooks is the tremendous reduction in the value of copyrighted works which must result from a consistent and pervasive application of this practice.* One who creates a work for educational purposes may not suffer greatly by an occasional unauthorized reproduction. But if every school room or library may by purchasing a single copy supply a demand for numerous copies through photocopying, mimeographing or similar devices, the market for copyrighted educational materials would be almost completely obliterated. This could well discourage authors from creating works of a scientific or educational nature. If the 'progress of science and useful arts' is promoted by granting copyright protection to authors, such progress may well be impeded if copyright protection is largely undercut in the name of fair use. [Emphasis supplied.]

In any event, the "gentlemen's agreement" by its own terms condemned as "not * * * fair" the making of photocopies which could serve in "substitution" for the original work, and further noted that "[o]rders for photo-copying which, by reason of their extensiveness or for any other reasons" could serve as duplicates of the original copyrighted work "should not be accepted." Thus, the most that can be said for the "gentlemen's agreement" is that it supported (and probably still supports) the proposition that it is "reasonable and customary" (and thus "fair use") for a library to photocopy for a patron a part of a book, or even part of a periodical article, such as a chart, graph, table, or the like, so long as the portion copied is not practically a substitute for the entire original work. Other instances of library photocopying may also be "fair use." *E.g.*, a library no doubt can replace damaged pages of copyrighted works in its collection with photocopies; can make a small number of photocopies for in-house administrative purposes, such as cutting up for cataloging or

the like; or can supply attorneys or courts with single photocopies for use in litigation. In all those instances, and probably many more which might come to mind on reflection, the rights of the copyright owner are not materially harmed. The doctrine of "fair use" and the "gentlemen's agreement," however, cannot support wholesale copying of the kind here in suit.[18]

Defendant also contends that traditionally, scholars have made handwritten copies of copyrighted works for use in research or other scholarly pursuits; that it is in the public interest that they do so because any harm to copyright owners is minimal compared to the public benefits derived therefrom; and that the photocopying here in suit is essentially a substitute for handcopying by the scholars themselves. That argument is not persuasive. In the first place, defendant concedes that its libraries photocopy substantially more material than scholars can or do copy by hand. Implicit in such concession is a recognition that laborious handcopying and rapid machine photocopying are totally different in their impact on the interests of copyright owners. Furthermore, there is no case law to support defendant's proposition that the making of a handcopy by scholars or researchers of an *entire* copyrighted work is permitted by the copyright laws. Certainly the statute does not expressly permit it; and no doubt the issue has never been litigated because, as a practical matter, such copying is *de minimis* and causes no real threat to the copyright owner's legitimate right to control duplication and dissemination of copyrighted works. The photocopying done by NLM and the NIH library, on the other hand, poses a real and substantial threat to copyright owners' legitimate interests. Professor Nimmer discusses the point succinctly, at 653–54 of his treatise, and his language can hardly be improved upon:

> It may be argued that library reproduction is merely a more modern and efficient version of the time-honored practice of scholars in making handwritten copies of copyrighted works, for their own private use. In evaluating this argument several factors must be considered.

[18] The potential pernicious effects of modern, institutionalized photocopying of copyrighted works (particularly journal articles) in the name of "fair use" is discussed at length in the Sophar and Hellprin report. The authors, at 24, characterize wholesale copying by libraries as "a non-violent form of civil disobedience."

> In the first place, the drudgery of making handwritten copies probably means that such copies in most instances are not of the complete work, and the quantitative insignificance of the selected passages are such as generally not to amount to a *substantial* similarity. Secondly, there would appear to be a qualitative difference between each individual scholar performing the task of reproduction for himself, and a library or other institution performing the task on a wholesale basis for all scholars. If the latter is fair use, then must not the same be said for a non-profit publishing house that distributes to scholars unauthorized copies of scientific and educational works on a national or international basis? Finally, it is by no means clear that the underlying premise of the above argument is valid.
>
> There is no reported case on the question of whether a single handwritten copy of all or substantially all of a protected work made for the copier's own private use is an infringement or fair use. If such a case were to arise the force of custom might impel a court to rule for the defendant on the ground of fair use. Such a result, however, could not be reconciled with the rationale for fair use suggested above since the handwritten copy would serve the same function as the protected work, and would tend to reduce the exploitation value of such work. Moreover, if such conduct is defensible then is it not equally a fair use for the copier to use his own photocopying or other duplicating device to achieve the same result? Once this is acknowledged to be fair use, the day may not be far off when no one need purchase books since by merely borrowing a copy from a library any individual will be able to make his own copy through photocopying or other reproduction devices which technological advances may soon make easily and economically available.

To the same effect is a statement in the Varmer study at 62–63:

> It has long been a matter of common practice for individual scholars to make manual transcriptions of published material, though copyrighted, for their own private use, and this practice has not been challenged. Such transcription imposed its own quantitative limitations; and in the nature of the event, it would not be feasible for copyright owners to control private copying and use. But reproduction for private use takes on different dimensions when made by modern photocopying devices capable of reproducing quickly any volume of material in any number of copies, and when copies are so made to be supplied to other persons.

> Publisher's copies are bought for the private use of the buyer, and in some circumstances a person supplying copies to others will be competing with the publisher and diminishing his market.
>
> Not only is such competition unfair to the publisher and copyright owner, but it may be injurious to scholarship and research. Thus, it has been pointed out that widespread photocopying of technical journals might so diminish the volume of subscriptions for the journals as to force the suspension of their publication.

Also, the 1961 Register's Report notes at 25–26:

> Researchers need to have available, for reference and study, the growing mass of published material in their particular fields. This is true especially, though not solely, of material published in scientific, technical, and scholarly journals. Researchers must rely on libraries for much of this material. When a published copy in a library's collections is not available for loan, which is very often the case, the researcher's need can be met by a photocopy.
>
> On the other hand, the supplying of photocopies of any work to a substantial number of researchers may diminish the copyright owner's market for the work. Publishers of scientific, technical, and scholarly works have pointed out that their market is small; and they have expressed the fear that if many of their potential subscribers or purchasers were furnished with photocopies, they might be forced to discontinue publication.

Finally, defendant says that it is unconstitutional to construe the copyright law so as to proscribe library photocopying of scientific or technical writings because such photocopying is consonant with the constitutional purpose of copyright "to promote the progress of science." That argument misses the mark. Article I, section 8, clause 8, of the U.S. Constitution grants to Congress the "Power * * * To Promote the Progress of Science * * * by securing for limited Times to Authors * * * the exclusive Right to their * * * Writings * * *." The word "Science" is used in the sense of general knowledge rather than the modern sense of physical or biological science. *See* Rich, *Principles of Patentability*, 28 GEO. WASH. L. REV. 393, 394–97 (1960); H.R. REP. No. 1923, 82d Cong., 2d Sess. 4 (1952); S. REP. No. 1979, 82d Cong., 2d Sess. 3 (1952). Congress has exercised its constitutional power by enacting, and revising from time to time, copyright statutes which are the method of, and provide a *system* for, achieving the constitu-

tional purpose. The system "promotes progress" by encouraging authors to write and publicly disclose their writings; by inducing publishers and entrepreneurs to invest risk capital in the dissemination of authors' writings; and by requiring other authors to create new writings, rather than plagiarize the old, all of which is in the public interest. *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954), *rehearing denied*, 347 U.S. 949. Congress has broad discretion under the Constitution to prescribe the conditions under which copyright will be granted, the only express restriction being that any "exclusive right" must be for a "limited time." Nothing in the present statute, its legislative history or the case law suggests that Congress intended to exempt libraries or others from liability for wholesale copying of copyrighted works, whatever be the purpose or motivation for the copying. What defendant really appears to be arguing is that the copyright law *should* excuse libraries from liability for the kind of photocopying here in suit. That, of course, is a matter for Congress, not the courts, to consider for it involves questions of public policy aptly suited to the legislative process. In an analogous context in *Fortnightly Corp.*, *supra*, Justice Fortas noted at 408:

> The task of caring for CATV is one for the Congress. Our ax, being a rule of law, must cut straight, sharp, and deep; and perhaps this is a situation that calls for the compromise of theory and for the architectural improvisation which only legislation can accomplish.

See also White-Smith Music Co., *supra*, where the Court noted at 18, that "considerations [of what the copyright laws should provide] properly address themselves to the legislative and not the judicial branch of the Government." [14]

III

Several other points raised by the parties merit comment. Defendant notes that the National Library of Medicine Act

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[14] There has been no dearth of activity to revise the 1909 Copyright Act. Some of that activity relates to library photocopying problems. See, e.g., Hearings on H.R. 4347 and other bills before Subcomm. No. 3, House Comm. on the Judiciary, 89th Cong., 1st Sess. 448, 459, 1133 (1965); S. 597, H.R. 2512, 90th Cong., 1st Sess. (1967); S. 543, 91st Cong., 1st Sess. (1969); S. Rep. No. 91-1219, 91st Cong., 2d Sess. 5 (1970); S. 644, 92d Cong., 1st Sess. (1971). For a brief history of legislative activity directed toward revision of the 1909 Copyright Act, *see Fortnightly Corp.*, *supra* at 396 n. 17; UCLA Project at 931-38.

by which NLM was created (42 U.S.C. § 275, *et seq.*) provides at § 276(4) that the Secretary of Health, Education, and Welfare, through NLM, shall "make available, through loans, photographic or other copying procedures or otherwise, such materials in the Library as he deems appropriate * * *"; and that the Medical Library Assistance Act of 1965 (42 U.S.C. § 280b–1, *et seq.*) provides that grants be made to medical libraries for, among other things, "acquisition of duplicating devices, facsimile equipment * * * and other equipment to facilitate the use of the resources of the library." 42 U.S.C. 280b–7. Defendant suggests that by those statutory provisions Congress intended to exempt NLM and other grantee libraries from the copyright laws. As defendant puts it, "* * * the only reasonable interpretation [of the statutes] is that Congress knew that fair use would exempt such libraries from copyright infringement in the established use by libraries of such [photocopy] equipment." There is no merit to this. Nothing in the statutes or their legislative histories says anything about the copyright laws, and it cannot be inferred that Congress intended the statutes to be in derogation of the copyright laws, absent an express indication to the contrary.[16] *See generally* E. CRAWFORD, STATUTORY CONSTRUCTION § 227 (1940). No court has ever held that "fair use" applies to library wholesale photocopying; nor has there been a uniform and unchallenged policy among libraries and other institutionalized photocopiers on the bounds of "fair use." See note 11. Thus, it makes no sense to impute to Congress an intent for which there is no sound basis in judicial decision, or otherwise. The fact that the statutes authorize the libraries to make use, generally, of photocopying equipment and procedures, is not controlling or even very significant. Much material in library collections is either not copyrighted or is material on which the copyright has expired; and in either event, the material is in the public domain and can be freely copied.

Furthermore, the record shows that NLM, from the beginning, has been concerned about complying with the copyright laws and has never considered itself exempt therefrom. In 1957, NLM's Board of Regents discussed the library's pho-

[16] H.R. Rep. No. 941, 84th Cong., 2d Sess. (1956); S. Rep. No. 2071, 84th Cong., 2d Sess. (1956); H.R. Rep. No. 1026, 89th Cong., 1st Sess. (1965); S. Rep. No. 756, 89th Cong., 1st Sess. (1965).

tocopying practices and deemed them to create vexing copyright infringement problems. The Director of NLM was of the opinion that "sooner or later" the problems would bring "a test of the issue in the courts."

Defendant suggested at trial that payment of compensation to plaintiff for photocopying its journals would create a continuing undue and oppressive administrative and financial burden on NLM and the NIH library. Defendant has not pressed the point in its brief, perhaps because it is clear that plaintiff's right to compensation under 28 U.S.C. § 1498(b) cannot depend on the burdens of compliance. Nevertheless, defendant's point merits comment since courts should be mindful of the practical consequences of their decisions. Based on this record, defendant's fears are not justified. Both NLM and the NIH library already have administrative procedures by which they keep detailed records of photocopying. Both libraries require that written request slips be submitted by requesters of photocopies. The slips are a permanent record of the journals and pages photocopied. It would seem a routine, albeit tedious, matter to cull from those records the information necessary to calculate a reasonable royalty on the basis of the number of articles copied, or perhaps to come up with an acceptable formula for establishing a blanket annual royalty payment. Indeed, the evidence suggests that this is so. In 1967, NLM temporarily stopped photocopying articles from plaintiff's journals, as a result of plaintiff's charge of copyright infringement and requests for a reasonable royalty. NLM was able, as a practical matter, to flag all requests for photocopies from plaintiff's journals from April 27, 1967 to May 29, 1967, in order to refrain from copying them. On about May 29, 1967, photocopying was resumed and was monitored for about 90 days. Satisfied that the 90-day period was a representative sample, NLM found that it would have paid plaintiff about $250–$300 if it had acceded to plaintiff's request for royalty payment. The Director of NLM testified that, in his opinion, this was "a very small sum—surprisingly small sum." Similarly, the NIH librarian testified that payment of royalties for photocopying "has nothing to do with the operation of the library in the fulfillment of * * * [its] function. It is an economic and budgetary consideration and not a service-oriented kind of thing."

Nor does it appear that payment of royalties to other publishers will create an undue or oppressive administrative burden. The Sophar and Heilprin report notes, at 58–60, that based on a study of the photocopying practices of U.S. libraries, less than 1,000 publishers provide the material photocopied by libraries, and that about 5 percent of that number provide about 40 percent of the material copied. This simply means that nearly half of the materials photocopied emanate from about 50 publishers. No doubt, the materials photocopied by NLM and the NIH library come from an even smaller number of publishers since those libraries are highly specialized. In any event, by using modern management practices including computers and the like, it would appear that NLM and the NIH library can, with minimum disruption, cope with the necessary recordkeeping.[17]

Postscript: The issues raised by this case are but part of a larger problem which continues to plague our institutions with ever-increasing complexity—how best to reconcile, on the one hand, the rights of authors and publishers under the copyright laws with, on the other hand, the technological improvements in copying techniques and the legitimate public need for rapid dissemination of scientific and technical literature. The conflict is real; the solution not simple. Legislative guidelines seem appropriate.[18] The Sophar and Heil-

[17] It has been suggested that there be established a clearinghouse for access, permissions and payments for photocopying of copyrighted materials. The clearinghouse would relieve institutional copiers of the burdens of royalty distribution and might also be instrumental in setting up blanket royalty arrangements, thus relieving the institutions from most recordkeeping requirements. See, e.g., the Sophar and Heilprin report at 82. The clearinghouse concept has also been alluded to in a congressional report:

> * * * Despite past efforts, reasonable arrangements involving a mutual understanding of what generally constitutes acceptable library practices, *and providing workable clearance and licensing conditions*, have not been achieved and are overdue. The committee urges all concerned to resume their efforts to reach an accommodation under which the needs of scholarship and the rights of authors would both be respected. [Emphasis supplied.] [H.R. Rep. No. 83, 90th Cong., 1st Sess. 36 (1967).]

And it is interesting that Sophar and Heilprin found that librarians favored, two to one, the clearinghouse approach to the problem, even though many of those in favor "indicated a desire to settle an increasingly complex matter, rather than an enthusiastic approval of the idea." Sophar and Heilprin report, at p. v of the Summary.

[18] In 1969, several bills were introduced in both the Senate and House to establish a National Commission on Libraries and Information Science. Also in 1969, H.R. 8809 was introduced to provide for a "National Science Research Data Processing and Information Retrieval System." See 1969 Register of Copyrights Annual Rep. 6. Earlier, in 1967, the Senate enacted S. 2216, 90th Cong., 1st Sess., by which there would be created a commission to study and compile data on the reproduction and use of copyrighted works. The House took no action on the bill.

prin report, at pp. VIII–IX of the Summary, capsules the problem in a statement worth quoting:

> From the viewpoint of the information scientist, copyright may appear as an impediment to the most efficient flow of information. It is apparently a blockage in an information system. Our early tendency was to oppose and try to limit the protection and control granted in copyright for the sake of efficiency. After careful analysis we no longer do.
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> There is a philosophical reason for not wanting to see copyright destroyed and there are a number of practical reasons. The philosophical reason is simply a belief that copyright is one of a number of ways in which our society expresses its belief and hope that an individual can continue his identity in a world of mass efforts by assuring the individual, his publisher or his association sufficient income from his ideas to maintain a degree of independence. The erosion of the economic value of copyright must lead to federal support of all kinds of writing and, of course, control.
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> The practical reasons flow from the philosophical reasons. Publishers, non-profit as well as commercial, will simply not be able to continue publishing under an eroded system. The scientific and other professional societies which, through their memberships, have done the most to develop information-handling tools and media are the ones most hurt by them. A means must be developed to assure payment to the copyright owner in return for unlimited and uncontrolled access to and duplication of the copyrighted work.
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> Our only concern and "vested interest" in copyright since we became interested in the problem "is to find a way to protect the 'exclusive Right' of an author to his 'Writings,' while permitting the advantages of modern information dissemination systems to become as useful as they may without weakening or threatening the economic urge and the need to create." We believe the two must become reconciled, not in the interests of compromise, but simply because both concepts are too valuable for either one to be permitted to severely harm or destroy the other.

KUNZIG, *Judge*, joins in the foregoing dissenting opinion.

NICHOLS, *Judge*, dissenting:

I join in the Chief Judge's able dissent, and add a few words of my own. I agree with him that the photocopying of copyrighted material, as described in the findings, is not within the judge-made doctrine of fair use, and it should

not be. The majority has posed a question, whose answer it triumphantly demonstrates, but it is the wrong question. The issue is not whether we should "stop" defendant's photocopying. Such a stoppage, at the behest of a publisher who refused to license on fair terms could well be unconscionable, in my opinion, but we have no such publisher before us. Plaintiff here is willing to license. If he did want to halt the photocopying, he would be in the wrong court here.

As the majority admits, we lack the power to enjoin. *United States* v. *King*, 395 U.S. 1 (1969). Under 28 U.S.C. § 1498, as amended, all we can do, if we find infringement, is to award reasonable and entire compensation. The idea we are asked to "stop" the photocopying I suppose can be elaborated as follows: our decision would be *stare decisis* in other suits against non-government libraries in which injunctive relief is expressly authorized. 17 U.S.C. §§ 101(a), 112. However, the latter section authorizes injunctions on terms. There is high authority under earlier legislation that courts can refuse to enjoin copyright infringements if they deem an injunction would be unconscionable. *Dun* v. *Lumbermen's Credit Ass'n.*, 209 U.S. 20 (1908). Under the 1909 Act, the Second Circuit held in *National Comic Publications, Inc.* v. *Fawcett Publications, Inc.*, 198 F. 2d 927 (1952), refusing to direct an injunction on remand:

> * * * We think it best to leave open to the district court the question whether an injunction shall issue, since that is always a discretionary matter.

The Ninth Circuit also recognizes that same principle. *Shapiro, Bernstein & Co.* v. *4636 S. Vermont Ave., Inc.*, 367 F. 2d 236 (1966).

The Senate Study on Copyright Law Revision, Committee On The Judiciary Pursuant to S. Res. 240, Studies 22-25, 86th Cong. 2d Sess., says at p. 127:

> * * * * *
>
> The present law leaves it to the discretion of the court whether an injunction will be granted or denied. It has always been the rule of the courts that an injunction is an extraordinary remedy to be used only where further injury to the plaintiff is likely and the equities of the situation are on the side of injunctive relief, and the courts have denied an injunction in cases where it was

thought that this remedy would be unduly harsh on the defendant.

* * * * *

In *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944), the Supreme Court construed the wartime Emergency Price Control Act as not mandating injunctive relief, although the language of the statute was more favorable to such a construction, than that of the Copyright Act. Mr. Justice Douglas said for the Court at p. 329:

> * * * We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity." *Meredith* v. *Winter Haven*, 320 U.S. 228, 235. The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. * * *

In view of the many persuasive reasons our majority adduces why photocopying by non-profit libraries should not be "stopped", I deem it an over-large assumption that an award by us of reasonable and entire compensation to our plaintiff would by *stare decisis* bind other tribunals, at the behest of other plaintiffs, to enjoin such library photocopying.

The amended § 1498 prescribes an award of "reasonable and entire compensation" which shall include the statutory minima under 17 U.S.C. § 101(b). Whether any statutory minimum is there prescribed in the case of a library photocopy of a periodical article, is a far tangent from our present inquiry, but I am satisfied, if it is, it need not be so prohibitive or punitive as to "stop" the photocopying.

Moreover, as to the question of fair use, I have difficulty regarding a use as fair, when a user benefits as extensively from the copyrighted material as this one does, yet adamantly refuses to make any contribution to defray the

publisher's cost, or compensate for the author's effort and expertise, except the nominal subscription price of two copies of each periodical. Defendant's libraries, and others, have attempted to exercise a measure of self-restraint hitherto, but there is nothing in the majority decision to induce them to continue, that is not more than counterbalanced by other material that will encourage unrestricted piracy. However hedged, the decision will be read, that a copyright holder has no rights a library is bound to respect. We are making the Dred Scott decision of copyright law.

I think the court also errs in inputing to Herbert Putnam, Librarian of Congress, an interpretation of the 1909 statute consistent with the court's. The brief for a group of amici put before us a 1908 regulation of that library which, the brief says, included this provision:

> *Photographing.* Photographing is freely permitted. The permission extends to the building itself and any of its parts, including the mural decorations. *It extends to articles bearing claim of copyright*, but the Library gives no assurance that the photograph may be reproduced or republished or placed on sale. These are matters to be settled with the owner of the copyright. (Emphasis supplied.)

Assuming this is properly a matter for judicial notice, the omission to include it in the trial judge's findings (or to request inclusion) may perhaps be overlooked. Yet, as part of self-serving statements of historical fact in a brief, it avoids explanations such as an adverse party at the trial level might have furnished. The regulation possibly alluded to *articles* (*i.e.*, in common speech, short non-fiction writings) if it alluded to copyrighted printed matter. Why was not, *e.g.*, copyrighted fiction of equal concern? The explanation that suggests itself to me as possible is that the *articles* mentioned are, or at least include, three-dimensional objects, or artifacts. The provision is too ambiguous in its coverage to afford any indication of how Putnam interpreted the copyright law.

The 1913 regulation, in a new section entitled *Photostat*, deals for the first time with reproduction of two-dimensional material. The court quotes it. It includes no caution as to copyright. The former provision as to photographing is continued unchanged. It seems a fair inference that no copyright caution was considered necessary as to two-dimensional

material because the then method of photograph duplication of such material, known as photostating, was too costly, cumbersome and slow, to appear as a menace to holders of copyrights. Those of us whose memories go back to law practice in the thirties can take judicial notice that use of the method to generate copyright infringements on a major scale would have been unthinkable. A single copy of an infringing book or magazine article, produced by photostating, would have cost two dollars or so per page. If this recollection is carrying judicial notice too far, let us drop the Putnam argument altogether.

Finally, I must note the repeated alterations made in the trial judge's fact findings. Specifically:

New sentence in finding 6, that the requesters needed the articles in connection with their professional work, and used their copies solely for such purposes.

Deletions from finding 10 of part (b) explaining how copyright passes from authors to publishers.

Insertion in finding 17(b) that libraries' self-restraint policies are not abused or circumvented.

Insertion in finding 22(c), same effect.

Insertion in finding 39(b) that plaintiff's business is growing faster than the gross national product. This is irrelevant if true. Why not a comparison with the growth of the national debt? Or the total gate receipts of the National Football League?

Deletion from finding 39(d) of inference that plaintiff must have suffered some loss from photocopying and substitute statement he has failed to show substantial hurt. Trial Judge Davis also found, with record support, that at least one subscriber cancelled a subscription to one of plaintiff's journals because the cost of photocopying the journal had become less than the journal's annual subscription price. There was evidence that in another instance, a subscriber cancelled a subscription at least in part because library photocopies were available.

The relevance and effect of these changes is doubtful in light of the fact that the statutory minima under § 101(b) are apparently intended to take care of instances where a plaintiff cannot prove actual damages. *Cf.*, *Shapiro, Bernstein & Co.* v. *4636 S. Vermont Ave., Inc.*, *Supra.*

I do not think these alterations were proper in light of the presumption that the trial judge's findings are correct. Rule 147(b). They also suggest that the court would have had difficulty reaching the conclusion it did if it had respected the findings as it should have done. If plaintiff's business is really growing faster than the gross national product or other indicia, without the court's protection, the place to take this into account is in the determination of reasonable and entire compensation.

FINDINGS OF FACT

The court, having considered the evidence, the decision and findings of former Trial Judge James F. Davis, and the briefs and arguments of counsel, makes findings of fact as follows:

1. This is a copyright suit under 28 U.S.C. § 1498(b). Plaintiff seeks reasonable and entire compensation for alleged infringement by the United States of certain copyrights in medical journals.

2. Plaintiff, The Williams & Wilkins Company, is a publisher located in Baltimore, Maryland. Though a relatively small company, plaintiff is one of the major publishers of medical journals in the United States. Plaintiff also publishes medical books. Plaintiff is a family-owned corporation, and its principal officers are William M. Passano and Charles O. Reville.

3. The Government agency accused of infringement is the Department of Health, Education, and Welfare, in particular the National Institutes of Health (NIH) and the National Library of Medicine (NLM). NIH and NLM are located in Bethesda, Maryland.

4. The petition was filed in this court on February 27, 1968, and was amended on July 23, 1970. The petition alleged infringement by reason of the Government's unauthorized photocopying of seven journal articles, identified below as Counts I to VII. The amended petition alleged infringement by reason of the Government's unauthorized photocopying of one journal article, identified below as Count VIII. The articles, and the journals in which they were published, are as follows:

Count	Article	Authors	Journal	Vol.	Issue	Pages	Month	Year
I.	The Genetic Mucopolysaccharidoses	Victor A. McKusick, David Kaplan, David Wise, W. Brian Hanley, S. B. Suddarth, M. E. Sevick, A. Edward Maumanee.	*Medicine*	44	6	445-483	Nov	1965
II.	Supersensitivity and Subsensitivity to Sympathomimetic Amines.	Ullrich Trendelenburg	*Pharmacological Reviews*	15	2	225-276	June	1963
III.	Detection of Two Antibodies in Single Plasma Cells by the Paired Fluorescence Technique.	R. N. Hiramoto, M. Hamlin	*Journal of Immunology*	95	2	214-224	Aug	1965
IV.	Fluorescent Antibody Staining	B. T. Wood, S. H. Thompson, G. Goldstein.	*Journal of Immunology*	95	2	225-229	Aug	1965
V.	Chromatographic Purification of Tetramethylrhodamine-Immune Globulin Conjugates and Their Use in the Cellular Localization of Rabbit Gamma-Globulin Polypeptide Chains.	John J. Cebra, Gerald Goldstein	*Journal of Immunology*	95	2	230-245	Aug	1965
VI.	The Stability of Messenger Ribonucleic Acid in Antibody Synthesis.	Velta Lazda, Jason L. Starr	*Journal of Immunology*	95	2	254-261	Aug	1965
VII.	The Course of Non Specific Ulcerative Colitis: Review of Twenty Years Experience and Late Results.	Benjamin M. Banks, Burton I. Korelitz, Louis Zetzel.	*Gastroenterology*	32	6	983-1012	June	1957
VIII.	Occlusion of the Hepatic Veins in Man	R. G. F. Parker	*Medicine*	38	4	369-402	Dec	1959

5. (a) Plaintiff publishes 37 medical journals, all of which are copyrighted. Of these, 26 are published in conjunction with professional societies, with the copyright being owned by plaintiff in 13 of such journals and the societies owning the copyright in the remaining 13. The journal *Medicine* is published by plaintiff for its own benefit, *i.e.*, not in conjunction with a professional society. The journal *Pharmacological Reviews* is and has been published by plaintiff since 1909 in conjunction with the American Society for Pharmacology and Experimental Therapeutics. The *Journal of Immunology* is and has been published by plaintiff for about 50 years in conjunction with the American Association of Immunologists. The journal *Gastroenterology* is and has been published by plaintiff since 1946 in conjunction with the American Gastroenterological Association. The four journals above named are published with notice of copyright in plaintiff's name. Plaintiff has contracts with the above-noted professional societies, which contracts deal in part with copyright. Although there are differences in phraseology among the contracts, such differences have led to no problems in dealings between plaintiff and the societies with respect to copyright matters. So far as the record shows, the parties to the contracts consider it the responsibility of plaintiff to enforce the copyright by granting licenses or instituting appropriate lawsuits.

(b) The agreement relating to copyright between plaintiff and the American Society for Pharmacology and Experimental Therapeutics (ASPET), under which agreement *Pharmacological Reviews* is published, provides as follows:

* * * * *

> 5. COPYRIGHT. The Society is sole owner of the periodical but for the sake of convenience, copyright shall be taken out in the name of the Publisher. Procurement of copyright of each issue is the duty of the Publisher and the costs incident thereto shall be charged to the profit-and-loss account of the periodical. The Publisher may publish or permit others to publish excerpts from the periodical after publication but such excerpting shall not be so substantial as to interfere with the sale of the periodical.

* * * * *

525-615—73——6

10. REVERSION OF RIGHTS. In case of bankruptcy, assignment for benefit of creditors, or liquidation for any cause of the Publisher, or upon termination of this Agreement for any cause stipulated herein, all rights conveyed under this Agreement by the Society to the Publisher shall revert to the Society forthwith.

* * * * *

The agreement was in effect at all times here material. There is no evidence that ASPET objected to, acquiesced in, or was any way involved with, the bringing of this suit by plaintiff.

(c) The agreement relating to copyright between the American Association of Immunologists (AAI) and plaintiff, under which agreement the *Journal of Immunology* is published, provides as follows:

* * * * *

5. *PROCUREMENT OF COPYRIGHT.* The Association is the owner of the periodical but for the convenience of both parties copyright shall be procured by and in the name of the Publisher, and the costs incident thereto shall be charged to the profit-and-loss account of the periodical. *The Association reserves the right to have the copyright assigned to the Association if at any time in the future this seems desirable.* [Emphasis supplied.]

* * * * *

The agreement was in effect at all times here material. There is no evidence that AAI ever exercised its right to have assigned to it by plaintiff the ownership of any copyright registration in the *Journal of Immunology*. Nor is there evidence to show that AAI objected to, acquiesced in, or was any way involved with, the bringing of this suit by plaintiff.

(d) The agreement relating to copyright between the American Gastroenterological Association (AGA) and plaintiff, under which agreement *Gastroenterology* is published, provides as follows:

* * * * *

(2) COPYRIGHT. The Association grants to the Publisher the exclusive right to copyright, in the name of the Publisher, and to renew such copyrights, all material published in the said Journal, and to publish the said work in all languages during the term of the copyright.

* * * * *

The agreement has been in effect since 1942. There is no evidence that AGA objected to, acquiesced in, or was in any way involved with, the bringing of this suit by plaintiff.

6. (a) The Count I-to-Count VIII articles were published in their respective journals on or about the dates indicated in finding 4. The journals were published with a notice of copyright consisting of the word "Copyright," the symbol "©", the name "The Williams & Wilkins Company," and the year of publication affixed to the title page of, and elsewhere on, each journal. In due course, the Register of Copyrights issued to plaintiff, with respect to each of the journals, the following certificates of registration:

Journal	Certificate of Registration Number
Medicine, Vol. 44, No. 6	B 251973
Pharmacological Reviews, Vol. 15, No. 2	B 49574
The Journal of Immunology, Vol. 95, No. 2	B 216408
Gastroenterology, Vol. 32, No. 6	B 663158
Medicine, Vol. 38, No. 4	B 809926

(b) Only the issue of liability is now before the court; accounting, if any, is reserved for later proceedings. Defendant admits that at least one photocopy of each of the Count I-to-Count VIII articles was made by defendant's NIH or NLM without authorization of plaintiff within the pertinent accounting period, as follows:

Article	Date Photocopied	Name of Requester
Count I	9/29/67	Backman
" "	10/5/67	Gabor
" "	10/19/67	Backman
Count II	9/29/67	McCallum
Count III	9/27/67	McEnany
Count IV	9/27/67	McEnany
" "	11/13/67	Reynolds
Count V	9/27/67	McEnany
" "	11/13/67	Reynolds
Count VI	9/27/67	McEnany
Count VII	10/12/67	Bird
Count VIII	1/11/68	Pitcher
" "	12/68	Young

The persons named above as "Requester" are all physicians or other professional medical personnel who requested from NIH or NLM copies of the articles in connection with medical research work or patient care at NIH or elsewhere. The copies were retained by the requesters who, for the most part, kept them in personal files as permanent documents for later reference and use, or put them in files available for use by coworkers or colleagues. The requesters needed the articles in connection with their professional work, and the copies were used solely for those purposes. The request by Dr. Pitcher of the Count VIII article was to NLM through an Army hospital library in Japan. All other requests listed above were to the NIH library and were made directly by the requester.

7. The number of subscriptions in the year 1969 and the annual subscription prices for the journals involved in this suit are as follows:

Journal	Approximate Number of Subscriptions	Price
Medicine	5,400	$12.00
Pharmacological Reviews	3,100	15.00
Journal of Immunology	4,700	[1] 22.00
		[2] 44.00
Gastroenterology	7,000	[1] 12.50
		[2] 25.00

[1] Members.
[2] Nonmembers.

8. Plaintiff's journals, noted in finding 7, are widely distributed in medical libraries throughout the country, are in the collection at the NIH library and are included on a list of journals of widespread availability compiled by NLM.

9. (a) Plaintiff's function, as a publisher of medical and scientific journals and books, is to determine what is needed to advance knowledge in the field of medicine; determine who is qualified to write on that subject; and edit, produce and market their manuscripts. Plaintiff accepts manuscripts from physicians and related medical professionals for publication in an appropriate journal. The considerations which influence a contributor of a manuscript as to the journal to which to submit the manuscript include (i) the subject mat-

ter and length of the manuscript, (ii) the quality of articles published in the journal, (iii) the standing of the journal's editorial board, (iv) the nature of the journal's readership, and (v) the circulation of the journal. Contributors rarely publish their own articles because of the high cost involved and because acceptance by a leading journal marks the article as one of high quality. *E.g.*, *Gastroenterology* is considered the outstanding journal in its speciality field in the United States and probably in the world. Contributors submit manuscripts to *Medicine* because that journal publishes lengthy, definitive articles and is well-disseminated.

(b) A board of editors of each of plaintiff's journals screens the submitted manuscripts, and manuscripts suitable for publication are edited and revised, as necessary and within the discretion of the editors. Often, substantial editing is done by the editorial board; sometimes contributors are required to revise manuscripts prior to acceptance. If a journal is the official organ of a professional society, the society appoints the board of editors. The editors are responsible to the society and are compensated by the society which, in turn, shares with plaintiff the profits from journal sales, in accordance with the particular contractual relationship between plaintiff and the society. Revenues from plaintiff's journals are derived largely through subscription sales and also through advertising. The American Gastroenterological Association and the American Association of Immunologists get 50 percent of the profits from *Gastroenterology* and the *Journal of Immunology*, respectively. The American Society for Pharmacology and Experimental Therapeutics gets 90 percent of the profits from *Pharmacological Reviews*. Printing preparation costs are about 50–65 percent of the total cost of publication of plaintiff's journals.

10. Authors whose manuscripts are accepted and published by plaintiff, including the authors of the articles here in suit, are not paid monetary compensation by plaintiff; moreover, some journals require that authors pay a fee for published pages in excess of a preselected number of pages. Authors are, however, gratified when plaintiff publishes their works because of enhancement of their professional status, in that their works are screened by highly critical editors and are published in journals having wide dissemination and

high reputation. Authors, therefore, submit manuscripts to plaintiff for dual purposes: to disseminate medical information for the public welfare; and to seek recognition from the scientific community from which flows increased professional and economic opportunity. Most articles published in plaintiff's journals, and like journals, are the result of research work done under private or public grant; and sometimes a requirement of the grant is that the research worker will seek to have the results of the work published. Sometimes, the grants include funds to pay for excess-page charges to a journal publisher.

11. Authors whose articles are published by plaintiff usually purchase from plaintiff reprints of their articles (on the average, about 300) for distribution to interested colleagues. In general, the number of reprints purchased by authors, per article, has not changed over the past 10 years. Most authors distribute reprints free of charge to those requesting them. Depending upon the importance of, and professional interest in, a particular article, all reprints are distributed by authors within several months up to several years after publication. If someone requests directly from plaintiff a copy of an article appearing in one of plaintiff's journals, plaintiff first refers the requester to the author for a reprint; then offers to sell (either directly or through a licensed reprint house) a back copy of the issue in which the article appeared; and, finally, refers the requester to the Institute of Scientific Information, plaintiff's licensee for making photocopies. (Finding 36.) Authors who want to reprint one of their articles from one of plaintiff's journals request plaintiff's permission to do so. Others wanting to reprint articles from one of plaintiff's journals usually ask permission of the author and also ask permission of plaintiff.

12. (a) NIH constitutes 10 institutes, each of which is concerned with a specialty of health and medical care. The mission of NIH is to advance health and well-being through the support of research in diseases, the support of educational and medical institutions, and improved biomedical communications. Generally, three types of activities are carried on by NIH: education and manpower training; communication of medical information; and research conducted by the various institutes. Research, as well as educa-

tion and manpower training, is performed by Government employees of the institutes and also by private persons and organizations supported by NIH grants. Biomedical communication is the function of NLM. (Finding 20.) NIH employs over 12,000 persons, 4,000 of whom are professionals and 2,000 of whom have doctoral degrees. In fiscal 1970, NIH spent over $1.5 billion for medical research, about $100 million of which was for intramural medical research. The balance was spent either for other intramural programs or for grants to outside organizations.

(b) Total national support of medical research, both Federal and non-Federal, has increased enormously in the period 1950–1970. In 1950, only about $160 million were spent. By 1970, the total spent was $2.7 billion. In 1950, the Federal Government contributed less than half the funds available for medical research. In 1970, the Federal Government contributed nearly two-thirds.

13. A library is essential to the conduct of medical research. A principal product of research scientists is their publications and publication of results is a vital part of research. NIH maintains and operates a technical library which is open to the public. The library houses about 125,000 to 150,000 volumes, of which 30,000 are books. The balance is periodicals or journals. The NIH library subscribes to over 3,000 different journal titles, of which 600 are purchased in multiple copies. The functions of the NIH library include acquisition, selection and cataloging of journal and book materials, preparation of reference services, response to queries for specific information, bibliographic services, formulation of computerized searches, a translation unit, housekeeping service, and a library copy service. The library's budget for 1970 was about $1.1 million, of which about $85,000 was for purchase of journal materials.

14. The NIH library subscribes to all 37 journals which plaintiff publishes. For about one-third of such journals, the library gets more than one copy. The library gets two copies of each of the four journals involved in this suit.

15. As an integral part of its operation, the NIH library operates a comprehensive system of providing photocopies of articles in scientific journals. Photocopying at the NIH library (as well as at NLM) includes making a photographic

copy of an article on microfilm, and then using the microfilm for further photocopying. The NIH photocopying service uses two Xerox copying machines and two Recordac microfilm cameras. The microfilm cameras are used in conjunction with a Xerox Copy-Flo printer to provide NIH personnel with permanent copies of journal articles. The microfilm is destroyed after a hard Xerox copy is made. NIH leases its Xerox machines from Xerox Corporation which it pays according to the number of pages photocopied. Microfilm used to photocopy articles at the NIH library is sent to NLM for processing. Such processing could be done by any commercial developer having the necessary equipment. Four regularly assigned employees operate the NIH photocopy equipment. In fiscal 1970, the library's photocopying budget was $86,000 and the library filled 85,744 requests for photocopies of journal articles, constituting about 930,000 pages. The average request was about 10–12 pages and the average cost per request was about $1.

16. Photocopying services of the NIH library are available only to NIH personnel. Members of the general public, while they may use the library, are not permitted to have materials photocopied. Two kinds of service are provided: over-the-counter and by mail. To get a photocopy, the requester must submit a request slip and an authorization slip. Authorization slips permit copying of either 20 pages or less, or 6 pages or less. The requirement for authorization slips is a budgetary limitation to hold down photocopying costs. Costs of library operation, including photocopying, are shared by the various institutes of NIH on a pro-rata basis.

17. (a) The photocopying policies of the NIH library have been essentially the same from 1965 to the present. If the library subscribes to but one copy of a journal, that copy is maintained in the library for the use of readers. If the library subscribes to a second copy of a journal, such copy will circulate among interested persons at NIH. Upon the request of interested personnel, articles in journals are photocopied at no charge to the requester. The library's policy on photocopying is that, as a general rule, only a single copy of a journal article will be made per request and each request is limited to about 40 to 50 pages though exceptions may be, and in fact have been, made in the case of long articles, upon

approval of the Assistant Chief of the library branch. Also, as a general rule, requests for photocopying are limited to only a single article from a journal issue. However, exceptions to this general rule are routinely made, so long as substantially less than an entire journal is photocopied, *i.e.*, less than about half of the journal. Coworkers can, and frequently do, request single copies of the same article and such requests are honored. Also, there is nothing in the library's photocopying policy to prevent a user from returning month after month to get photocopies of one or more articles from one issue of a journal.

(b) NIH library personnel will not knowingly photocopy an entire issue of a journal. However, it is possible for a single user to make a series of separate requests which will result in the photocopying of an entire issue. The photocopy equipment operators are instructed to bring to the attention of their supervisor what they believe to be attempts to copy a substantial part, or all, of a journal issue. Nevertheless, because of the large volume of photocopying done by the library, it is difficult and impractical to police and curb such attempts. Substantially more people receive photocopies of journal articles from the NIH library than would copy by hand substantial portions of articles. Photocopies made by the library are not returned by the users. Sometimes the users make further photocopies from photocopies obtained from the NIH library to distribute to colleagues or otherwise. However, there is no showing that the library's policies have been abused or circumvented. Where the same person orders more than one copy the second has been for a colleague or to replace an illegible or undelivered copy. Nor is there a showing that the amount of the duplication of the same article has been excessive or unwarranted.

18. As a general rule, books (or monographs) which carry a copyright notice are not photocopied by the NIH library, even to the extent of a short chapter, without permission of the copyright owner. However, under special circumstances (the details of which are not clear from the record) and upon authorization of library supervisory personnel, exceptions are sometimes made to this rule to the extent of copying small portions, *e.g.*, charts or graphs, from books (or monographs).

19. Materials (*i.e.*, books and journals) not owned by the NIH library, and which are requested by users, are obtained by means of interlibrary loan. When an interlibrary loan is requested, the standard interlibrary loan form is used. Basically, the NIH library applies to interlibrary loan requests the same restrictions on photocopying as are applied to requests filled internally.

20. (a) The mission of NLM is the exchange and dissemination of medical information. NLM began as the library of the Surgeon General of the Army, which was founded in 1836. Later such library became the Armed Forces Medical Library; and in 1956, the library was transferred from the Department of Defense to the Public Health Service and renamed the National Library of Medicine. The statute creating NLM is codified as 42 U.S.C. §§ 275–280a (1970 ed.) which, in relevant part, reads as follows:

> § 275. **Congressional declaration of purpose; establishment.**
>
> In order to assist the advancement of medical and related sciences, and to aid the dissemination and exchange of scientific and other information important to the progress of medicine and to the public health, there is established in the Public Health Service a National Library of Medicine (hereinafter referred to in this part as the "Library").
>
> § 276. **Functions.**
>
> (a) The Secretary, through the Library and subject to the provisions of subsection (c) of this section, shall—
>
> (1) acquire and preserve books, periodicals, prints, films, recordings, and other library materials pertinent to medicine;
>
> (2) organize the materials specified in clause (1) of this subsection by appropriate cataloging, indexing, and bibliographical listing;
>
> (3) publish and make available the catalogs, indexes, and bibliographies referred to in clause (2) of this subsection;
>
> (4) make available, through loans, photographic or other copying procedures or otherwise, such materials in the Library as he deems appropriate;
>
> (5) provide reference and research assistance; and

(6) engage in such other activities in furtherance of the purposes of this part as he deems appropriate and the Library's resources permit.

* * * * *

(c) The Secretary is authorized, after obtaining the advice and recommendations of the Board (established under section 277 of this title), to prescribe rules under which the Library will provide copies of its publications or materials, or will make available its facilities for research or its bibliographic, reference or other services, to public and private agencies and organizations, institutions, and individuals. Such rules may provide for making available such publications, materials, facilities, or services (1) without charge as a public service, or (2) upon a loan, exchange, or charge basis, or (3) in appropriate circumstances, under contract arrangements made with a public or other nonprofit agency, organization, or institution.

§ 277. **Board of Regents.**

(a) Establishment; composition; * * *

There is established in the Public Health Service a Board of Regents of the National Library of Medicine * * *.

(b) **Duties of Board;** * * *

It shall be the duty of the Board to advise, consult with, and make recommendations to the Secretary on important matters of policy in regard to the Library, including such matters as the acquisition of materials for the Library, the scope, content and organization of the Library's services, and the rules under which its materials, publications, facilities, and services shall be made available to various kinds of users, * * *

* * * * *

(b) There is no evidence that the Surgeon General or any other agent of defendant has issued regulations implementing 42 U.S.C. § 276(c).

(c) The basic function of NLM is to acquire books, journals and the like relating to health and medicine to assure that all medical literature is available at one place. In addition to acquisition, NLM indexes and catalogs medical literature by means of *Index Medicus*, which is a compilation of citations to about 2,400 leading biomedical journals. *Index*

Medicus is sold to the medical profession and enables medical practitioners to keep abreast of the current medical literature. NLM's catalog announces new publications and acquisitions by the library, thus providing a ready reference for other libraries.

21. (a) NLM has five operating components, one of which is called Library Operations. The Reference Services Division of Library Operations is responsible for administering the interlibrary loan system, which is a system whereby one library may request materials from other libraries. NLM also receives requests for loans of materials from Government institutions, medical schools, hospitals, research foundations, private physicians, and private companies including drug companies. NLM provides the same service to commercial companies as it does to governmental and academic libraries. Requests by commercial companies, particularly drug companies, account for about 12 percent of NLM's service. Upon a request for materials, NLM determines whether to loan out the original material or to make photocopies of the material. As a general rule, articles from journals, when requested, are photocopied and the photocopies given free of charge to the requester, so that, in the case of journals, the term "loan" is a euphemism. If NLM receives a request for a paid photographic service which otherwise meets the conditions of an interlibrary loan, payment is rejected and a loan or photocopy is furnished free of charge.

(b) To make photocopies, NLM uses mobile 35-mm. microfilm cameras which have an electrical power line overhead and can move up and down an aisle of the library. Full-size photocopies are then made from the microfilm. Most photocopies are made by such microfilm technique. In fiscal 1968, NLM received about 127,000 requests for interlibrary loans, of which about 120,000 were filled by photocopying. Applying the average of 10 pages per request, about 1.2 million pages were thus photocopied.

22. (a) Interlibrary loan requests must be accompanied by a proper form, the format of which is standardized and used by libraries and other institutions throughout the United States. The loan form, as a general rule, must be signed by a librarian. However, NLM will at times honor requests from individuals (*e.g.*, physicians) or nonlibrary institutions.

Upon receipt of requests for interlibrary loans, NLM stamps the requests by date and time, counts them for statistical purposes, and begins the sorting procedure. Generally, NLM does not know, nor does it make any attempt to find out, the purpose of the requests. NLM will supply copies of the same journal article to an unlimited number of libraries requesting copies of an article, one after the other, on consecutive days, even with knowledge of such facts.

(b) NLM is a regional medical library and serves the mid-Atlantic region. Requests for materials coming from regions other than the mid-Atlantic region are generally referred to the appropriate regional library, and the requester is advised to submit future requests to the appropriate regional library. NLM's stated policy in recent years is not to fill requests for copies of articles from any of 104 journals which are included on a so-called "widely-available list." Rather, the requester is furnished a copy of the "widely-available list" and the names of the regional libraries which are presumed to have the journals listed. Exceptions are sometimes made to the policy, particularly if the requester has been unsuccessful in obtaining the journal elsewhere. The four journals involved in this suit are listed on the "widely-available list." A rejection on the basis of the "widely-available list" is made only if the article requested was published during the preceding 5 years. Requests from Government libraries are not rejected on the basis of the "widely-available list."

(c) NLM's policy is not to honor an excessive number of requests from an individual or an institution. As a general rule, not more than 20 requests from an individual, or not more than 30 requests from an institution, within a month, will be honored. In 1968, NLM adopted the policy that no more than one article from a single journal issue, or three from a journal volume, would be copied. Prior to 1968, NLM had no express policy on copying limitations, but endeavored to prevent "excessive copying." As a general rule, requests for more than 50 pages of material will not be honored, though exceptions are sometimes made, particularly for Government institutions. Requests for more than one copy of a journal article are rejected, without exception. If NLM receives a request for more than one copy, a single copy will be furnished and the requester advised that it is NLM's policy to

furnish only one copy. There is no showing that the amount of duplication of copies of the same article is excessive or unwarranted. Generally, requests for photocopies from books (or monographs) are rejected. NLM lends books (or monographs) for limited periods of time. In special cases (the details of which are not clear in the record), small portions of a book (or monograph), *e.g.*, charts or tables, will be photocopied.

23. (a) NLM, from time to time, issues statements to other libraries of its interlibrary loan policy. Its policy has remained essentially unchanged over the years. The statement of policy, as of January 1968, reads in pertinent part as follows:

* * * * *

> Readers who cannot obtain medical literature in their regions and who cannot come to the National Library of Medicine in person may use the interlibrary loan service of the Library by applying through a local library *subject to compliance with the following regulations and instructions and the provisions of the General Interlibrary Loan Code.* A large number of titles should not be requested at one time for one applicant or one institution.
>
> FORMS OF LOANS
>
> 1. The National Library of Medicine reserves the right to determine whether material will be lent in the original form or as a photoduplicate.
>
> 2. Photoduplicates sent instead of original material will be supplied without charge to requesting libraries. Photoduplicates may be retained permanently by the borrowing library, unless return is specifically requested by NLM.
>
> 3. Since this is an interlibrary loan service, multiple copies will not be furnished.
>
> 4. With sufficient justification NLM may lend complete issues or volumes of serials when such loan does not impair other service, but in no case will complete issues or volumes or substantial portions of issues or volumes be copied as a loan. Copying of complete issues or volumes may be considered under special photographic services.
>
> 5. Original material will not be lent outside the United States.
>
> METHOD OF BORROWING
>
> 1. Borrowing libraries will submit *typed* requests on the Interlibrary Loan Request form approved by the

American Library Association. Requests made by letter or on other types of forms cannot be processed and will be returned to sender. Each item or item segment must be requested on a separate form.

2. Order of citation must follow directions on the Interlibrary Loan Request form.

3. Each request must be authenticated, in handwriting, by authorized personnel in the borrowing library. Unsigned requests will be returned.

4. It is expected that under all but the most unusual circumstances librarians will avail themselves of the resources of their region before directing requests to NLM.

* * * * *

SPECIAL PHOTOGRAPHIC SERVICES

1. Special photographic procedures are required to reproduce some items in the collection, and a charge will be made for this service. Cost estimates are available on request. NLM will consider requests for copying items such as: portraits, photographs, etchings, and other pictorial work; text and line drawings; facsimile reproductions; long runs of periodicals to complete holdings.

2. Advance payment is required for all such photocopying when the requests emanate from outside the Federal Government. Orders for materials in which there is a question of copyright restriction will not be accepted for special photographic service without an accompanying permission statement from the copyright owner.

(b) NLM operates its interlibrary loan system in accordance with the General Interlibrary Loan Code, as revised in 1956. The Code states in pertinent part:

IX. *Photographic Substitution*

1. Time may be saved in filling the reader's request if, in the application for a loan, willingness is indicated to purchase a photographic reproduction as a satisfactory substitute should the original material be unavailable for interlibrary loan. This is especially applicable to periodical and newspaper articles and to typescript theses.

2. The type of photographic duplication (as a substitute) that is acceptable (*e.g.*, photostat; microfilm—negative or positive; record print; etc.) and the maximum price the borrowing library is willing to pay can appropriately be indicated on the original request. If preferred, the lending library may be asked to quote the

estimated cost of such a substitution before filling the order.

3. Photographic duplication in lieu of interlibrary loan *may be complicated* by interpretations of copyright restrictions, particularly in regard to photographing *whole issues* of periodicals or books with *current copyrights*, or in making *multiple copies* of a publication.*

4. Any request, therefore, that indicates acceptability of a photographic substitution, under the conditions described above, should be accompanied by a statement with the signature of the applicant attesting to his responsibility for observing copyright provisions in his use of the photographic copy.*

5. Requests indicating acceptability of photographic substitute in lieu of interlibrary loan that comply with the above provisions are to be considered *bona fide* orders for copying services. The lending library, if equipped to do so, may fill such orders with no further correspondence or delay.

24. Photocopies at NLM, for interlibrary loan purposes, are prepared using a microfilm camera and a Xerox Copy-Flo machine. Copying for in-house administrative purposes, oversized material, and material in oriental languages is done on Direct Copy Xerox 720 machines. Microfilm is destroyed after use. Each photocopy produced by the microfilm camera includes a statement as follows:

> This is a single photostatic copy made by the National Library of Medicine for purposes of study or research in lieu of lending the original.

25. Since 1966 through 1970, there has been a steady decline in the amount of material or number of requests filled for photocopies through the interlibrary loan program of NLM. In 1969, the number of interlibrary loan requests filled was 110,573 and in 1970, 93,746. A principal reason for the decline is that regional libraries have taken on much of the burden of the program. The regional libraries operate in essentially the same manner as NLM except that some, if

*These statements on photographic substitutions are based on the "Gentlemen's Agreement" written in 1935 by the National Association of Book Publishers (reaffirmed in 1938 by its successor the Book Publishers Bureau) and the Joint Committee on Materials for Research (representing the libraries). For the text of this agreement see the *Journal of Documentary Reproduction*, 2:29–30, March 1939. [Finding 41.]

not all of them, charge a fee for photocopies furnished to requesters. The budget for the interlibrary loan operation at NLM in fiscal 1969 was $166,152.

26. The Count I, IV, V, and VI articles acknowledge on their faces that the research work reported therein was supported in part by grants awarded to the authors by the Public Health Service of NIH.

27. The Division of Research Grants of the Public Health Service is a service organization to NIH. Applications for grant support from NIH come to the Division of Research Grants, which determines the institute of NIH to which they shall be referred and the review group to which the application shall be assigned. Such group then reviews the application and determines its scientific merit, and also reviews the application's proposed budget with respect to, *e.g.*, salaries for personnel, equipment, supplies and services, travel funds, funds for the purchase of publications or journals, and funds for the payment of page charges and other costs of publications. The group's recommendation is transmitted to the appropriate institute. If a grant is subsequently awarded, the appropriate institute provides the funds and monitors the performance of the work under the grant. Grants are awarded on an annual basis and are characterized by the Public Health Service as "conditional gifts." NIH sometimes indicates at the beginning that it will support renewal applications. Renewal applications are administered by the Division of Research Grants. The scientific investigator under a grant award can pursue his research in any manner he feels appropriate, subject to limited budgetary control. Such investigators are not Government employees nor are they in the service of the United States; and the Public Health Service does not exercise supervision over the scientific techniques used in the research.

28. The Division of Research Grants, from time to time, issues policy statements with respect to copyright which set out guidelines delimiting the rights and responsibilities of grantees under NIH grants. The policy statements in effect for the years 1956 to the present are set out below in subparagraphs (a) to (d).

(a) With respect to grants awarded from November 1956 to 1959, the Public Health Service policy governing copyright was as follows:

> When a grant or award is made without condition and a book or related material is privately published, the author is free to copyright the work and to make arrangements with his publisher as if the Government had not contributed support.

(b) With respect to grants awarded from 1959 to January 1, 1963, the Public Health Service policy governing copyright was as follows:

> *Copyright.*—The author is free to arrange for copyright without reference to the Public Health Service.

(c) With respect to grants awarded from January 1, 1963 to July 1, 1965, the Public Health Service policy governing copyright was as follows:

> COPYRIGHT The author is free to arrange for copyright without approval by the Public Health Service.

(d) With respect to grants awarded on or after July 1, 1965, the Public Health Service policy governing copyright was as follows:

> **Copyright** Except as otherwise provided in the conditions of the award, when publications result from work supported by the Public Health Service, the author is free to arrange for copyright without approval. Any such copyrighted publications shall be subject to a royalty-free, non-exclusive, and irrevocable license to the Government to reproduce them, translate them, publish them, use and dispose of them, and to authorize others to do so.

29. None of the Count I-to-Count VIII articles resulted from a Public Health Service grant which imposed conditions expressly modifying the copyright policies noted in finding 28, subparagraphs (a) to (c).

30. The policy statement dated July 1, 1965 (finding 28(d)), was the first public statement by the Public Health Service that it reserved the right to duplicate copyrighted works which resulted from Public Health Service grants. Prior to 1965, the Public Health Service had not addressed itself to the question of whether the Government should have

a nonexclusive license in works resulting from grant funds, though it had for some years been the policy that such works could be photocopied (up to 15 copies) for in-house administrative purposes.

31. The copyright policy of the Public Health Service, noted in finding 28(d), which by its terms was to become effective in connection with work supported by grants awarded on or after July 1, 1965, appeared in the *Federal Register*, in modified form, for the first time on April 2, 1970, at 35 Fed. Reg. 5470 (42 C.F.R. § 52.23 (revised as of Jan. 1, 1971)).

32. Dr. Victor A. McKusick, a coauthor of the Count I article, started research, along with several coworkers, in 1954 on the subject matter of the article. Work has continued up to the date of trial. The research was supported in part by funds from a Public Health Service grant; in part by funds from grants from the Health Research Council, a private trust; and in part by other funds which cannot be traced to any specific grant or agency. The manuscript for the Count I article was submitted to the editor of *Medicine* on August 19, 1964, and the article was published on December 9, 1965. Changes to reflect ongoing research were made in the manuscript by the authors from time to time, up to about 6 months before publication (*i.e.*, about mid-1965). After about mid-1965, any changes in the manuscript were editorial in nature, *e.g.*, citations to new articles added as footnotes, stylistic changes, and the like. There is no evidence that the article reports any substantive research work done under funds from a Public Health Service grant awarded on or after July 1, 1965.

33. Dr. Gerald Goldstein, a coauthor of the Count IV article, conducted research leading to its publication, which research was funded in part by Public Health Service grants. Such grants covered the years 1958 to 1966. The Count IV article was published in the *Journal of Immunology* in August 1965. There is no evidence to show when the manuscript for such article was completed, though the article states on its face that it was "received for publication" on December 18, 1964. There is no evidence to show that the article reported any substantive research work done under funds from a Public Health Service grant awarded on or after July 1, 1965.

34. Dr. John J. Cebra, a coauthor of the Count V article, conducted research leading to its publication, which research was funded in part by Public Health Service grants. The Count V article was published in the *Journal of Immunology* in August 1965. There is no evidence to show when the manuscript for such article was completed, though the article states on its face that it was "received for publication" on December 17, 1964. There is no evidence to show that the article reported any substantive research work done under funds from a Public Health Service grant awarded on or after July 1, 1965.

35. Dr. Jason L. Starr, a coauthor of the Count VI article, conducted research leading to its publication, which research was funded in part by Public Health Service grants. The Count VI article was published in the *Journal of Immunology* in August 1965. There is no evidence to show when the manuscript for such article was completed, though the article on its face states that it was "received for publication" on December 21, 1964. There is no evidence to show that the article reported any substantive research work done under funds from a Public Health Service grant awarded on or after July 1, 1965.

36. (a) Plaintiff has established a licensing program to cover various forms of exploitation of its medical journals. The program includes the following:

(i) Upon request, plaintiff grants permission, in the form of licenses, for reproducing a journal article as part of a newly published book or for reproducing articles in other forms, particularly for use by educational institutions.

(ii) Plaintiff has received requests from Government agencies and others for licenses to make multiple copies of journal articles, and plaintiff has granted such requests and has been paid therefor.

(iii) Plaintiff has granted licenses for the distribution and sale of microfilm editions of its journals, including the four journals in suit, to University Microfilm Company, Ann Arbor, Michigan, and Arcadia Microfilms, Spring Valley, New York, in consideration for a royalty paid to plaintiff.

(iv) Plaintiff has granted licenses, for a consideration, to two reprint houses in New York to furnish a requester with a reprint of a journal article or an entire journal.

(v) Plaintiff has granted a royalty-bearing license to the Institute for Scientific Information, Philadelphia, Pennsylvania, to provide requesters with copies of articles from plaintiff's journals.

(vi) Plaintiff has granted to several libraries (Veterans Administration Hospital library in San Francisco, California, the Dugway Technical Library and the Wilkin Research Foundation of New York) a license to make, on a continuing basis, single copies of articles from journals in return for the payment of royalties. Such licenses, however, have not produced royalties to date and two of the licenses are no longer in effect. The license to Wilkin Research Foundation was entered into in February 1970 and provides for a royalty of 5 cents per copied page, with accumulated royalties payable yearly.

(b) It is not clear whether plaintiff's licensing program for libraries extends to the making of copies for persons not applying at the library building.

37. Plaintiff receives about 45 to 60 requests per week to make copies from its various publications, about five of such requests being for copies of single articles from plaintiff's journals. Requests for copies of journal articles are handled by plaintiff as set out in finding 11.

38. Plaintiff receives about $6,000 to $7,000 per year for permissions granted to individuals to copy journal articles (single copies and otherwise). Such receipts are in addition to royalties received from the Institute for Scientific Information, reprint houses and microfilm licensing.

39. (a) Between 1959 and 1969, annual subscriptions to *Medicine* increased from about 2,800 to about 5,400, though subscriptions decreased slightly from 1968 to 1969. Annual subscription sales increased from about $20,000 to about $60,000; and total annual income increased from about $23,000 to about $65,000. Between 1964 and 1969, annual subscriptions to *Pharmacological Reviews* increased from about

2,600 to about 3,100, though subscriptions decreased slightly from 1968 to 1969. Annual subscription sales increased from about $19,000 to about $21,000; and total annual income increased from about $22,000 to about $25,000. Between 1959 and 1969, annual subscriptions to the *Journal of Immunology* increased from about 2,600 to about 4,700. Annual subscription sales increased from about $36,000 to about $131,000; and total annual income increased from about $38,000 to about $185,000. Between 1959 and 1969, annual subscriptions to *Gastroenterology* increased from about 4,100 to about 7,000. Annual subscription sales increased from about $49,000 to about $155,000; and total annual income increased from about $108,000 to about $244,000.

(b) Between 1959 and 1966, plaintiff's annual taxable income increased from $272,000 to $726,000. In 1967, it fell to $589,000; and in 1968, to $451,000. Plaintiff's four journals in suit account for a relatively small percentage of plaintiff's total business; and over the years, such journals have been profitable, except that the *Journal of Immunology* showed losses in the period prior to 1961; *Gastroenterology* showed losses in 1967–68; and *Pharmacological Reviews* showed a loss in 1969. Profits from the journals have varied from less than $1,000 to about $15,000 annually. Plaintiff's share of the profits from the journals published under contract with medical societies has ranged from less than $1,000 to about $7,000. *E.g.*, in 1968, profit from *Pharmacological Reviews* was $1,154.44 (on sales of about $40,000). The profit was divided, $1,039 to ASPET and $115.44 to plaintiff. In 1969, net income from *Gastroenterology* was $21,312.08 (on sales of about $245,000) and $11,532.35 of that amount was offset by losses the previous year, leaving a balance of $9,779.73. The balance was split between plaintiff and AGA, plaintiff getting $4,889.86.

(c) Plaintiff's business appears to have been growing faster than the gross national product or of the rate of growth of manpower working in the field of science.

(d) There is no evidence to show whether any particular instance or instances of unauthorized photocopying of plaintiff's journals resulted in the loss of a particular form of revenue to plaintiff. It is also concluded that plaintiff has

failed to show that it has been hurt, in any substantial degree, by the photocopying practices of NLM and NIH.

40. (a) NIH (and so far as the record shows, NLM) has made no studies to determine the estimated costs over and above royalties which would be involved in paying publishers for photocopying part or all of their copyrighted journals. The costs involved in such an estimate would be essentially the salaries of the people who would make the necessary determinations. The Librarian of NIH testified that he is unable to make any estimate of such costs.

(b) In 1967, NLM temporarily ceased photocopying articles from plaintiff's journals. NLM was able, as a practical matter, to flag plaintiff's journals from April 27, 1967 to May 29, 1967, in order to refrain temporarily from copying from them. The flagging of plaintiff's journals was an administrative statistical operation performed by a library technician in the loan and stack section of NLM. On about May 29, 1967, NLM resumed photocopying articles from plaintiff's journals, and for about 90 days thereafter, NLM monitored such photocopying. Satisfied that such 90-day period was a representative sample, NLM found that it would have paid plaintiff about $250 to $300 if it had acceded to plaintiff's request for 2 cents royalty per page. The Director of NLM testified that, in his opinion, this was "a very small sum—surprisingly small sum." However, administrative costs involved in the payment of a royalty might be substantially greater than the royalty itself.

41. (a) In 1935, there was issued a joint statement by the National Association of Book Publishers and the Joint Committee on Materials for Research regarding the photocopying by libraries and like institutions of copyrighted materials. The statement, later to become known as the "gentlemen's agreement," was the product of meetings and discussions between representatives of the book publishing industry and research-and-education-oriented organizations, such as libraries. The representatives were interested in working out a practical accommodation of the conflict between (i) the legitimate interest of copyright owners not to have their works copied without compensation and (ii) the needs of scholars and research workers for copies of parts

of copyrighted works to use in pursuit of scientific or literary investigation. The "gentlemen's agreement," along with the introductory statement accompanying it, reads as follows:

> The Joint Committee on Materials for Research and the Board of Directors of the National Association of Book Publishers, after conferring on the problem of conscientious observance of copyright that faces research libraries in connection with the growing use of photographic methods of reproduction, have agreed upon the following statement:
>
> A library, archives office, museum, or similar institution owning books or periodical volumes in which copyright still subsists may make and deliver a single photographic reproduction or reduction of a part thereof to a scholar representing in writing that he desires such reproduction in lieu of loan of such publication or in place of manual transcription and solely for the purposes of research; provided
>
> (1) That the person receiving it is given due notice in writing that he is not exempt from liability to the copyright proprietor for any infringement of copyright by misuse of the reproduction constituting an infringement under the copyright law;
>
> (2) That such reproduction is made and furnished without profit to itself by the institution making it.
>
> The exemption from liability of the library, archives office or museum herein provided for shall extend to every officer, agent or employee of such institution in the making and delivery of such reproduction when acting within the scope of his authority of employment. This exemption for the institution itself carries with it a responsibility to see that library employees caution patrons against the misuse of copyright material reproduced photographically.
>
> Under the law of copyright, authors or their agents are assured of "the exclusive right to print, reprint, publish, copy and vend the copyrighted work," all or any part. This means that legally no individual or institution can reproduce by photography or photo-mechanical means, mimeograph or other methods of reproduction a page or any part of a book without the written permission of the owner of the copyright. Society, by law, grants this exclusive right for a term of years in the belief that such exclusive control of creative work is necessary to encourage authorship and scholarship.

While the right of quotation without permission is not provided in law, the courts have recognized the right to a "fair use" of book quotations, the length of a "fair" quotation being dependent upon the type of work quoted from and the "fairness" to the author's interest. Extensive quotation is obviously inimical to the author's interest.

The statutes make no specific provision for a right of a research worker to make copies by hand or by typescript for his research notes, but a student has always been free to "copy" by hand; and mechanical reproductions from copyright material are presumably intended to take the place of hand transcriptions, and to be governed by the same principles governing hand transcription.

In order to guard against any possible infringement of copyright, however, libraries, archives offices and museums should require each applicant for photo-mechanical reproductions of material to assume full responsibility for such copying, and by his signature to a form printed for the purpose assure the institution that the duplicate being made for him is for his personal use only and is to relieve him of the task of transcription. The form should clearly indicate to the applicant that he is obligated under the law not to use the material thus copied from books for any further reproduction without the express permission of the copyright owner.

It would not be fair to the author or publisher to make possible the substitution of the photostats for the purchase of a copy of the book itself either for an individual library or for any permanent collection in a public or research library. Orders for photo-copying which, by reason of their extensiveness or for any other reasons, violate this principle should not be accepted. In case of doubt as to whether the excerpt requested complies with this condition, the safe thing to do is to defer action until the owner of the copyright has approved the reproduction.

Out-of-print books should likewise be reproduced only with permission, even if this reproduction is solely for the use of the institution making it and not for sale.

(*signed*) ROBERT C. BINKLEY, *Chairman*
Joint Committee on Materials for Research
W. W. NORTON, *President*
National Association of Book Publishers

(b) The practice by libraries of making photocopies has existed for at least 50 years. In the 1930's—and prior thereto—photocopying of books and like materials was done

principally by conventional photographic techniques. Starting about 1960, the new technology of electrostatic copying and other rapid, inexpensive copying techniques resulted in a dramatic increase in the instances and amounts of photocopying. During the past 10 years, the propriety of library photocopying has been the subject of many discussions at meetings and conferences of library and information groups. In 1957, the Director of NLM noted that "it is possible, if not indeed probable, that the years would bring, sooner or later, a test of the issue in the courts" posed by NLM's photocopying activities and the copyright law.

(c) Plaintiff's principal officers became aware of large-scale library photocopying in about 1962. Immediately thereafter, plaintiff's president made his views on the subject known to various library groups. In the course of exchanges with librarians, plaintiff's president learned of the statement called the "gentlemen's agreement" and expressed his views thereon essentially as follows: The statement is inconsequential to the issues of present-day photocopying because (i) it was written in the 1930's when copying processes consisted of blueprints, photostats or microfilm, processes significantly different from those principally used today, (ii) one party to the statement (National Association of Book Publishers) is a long-defunct organization to which plaintiff never belonged, and (iii) the National Association of Book Publishers apparently consisted not of periodical publishers, like plaintiff, but book publishers who were concerned with the publication (and unauthorized photocopying) of books (or monographs).

42. (a) In October 1966, defendant's General Services Administration issued a handbook, COPYING EQUIPMENT, identified by code number FPMR 101–6. The purpose of the handbook was to acquaint Government supervisory personnel with the various photocopying machines available on the market and to encourage Government agencies to make use of such machines in an economic and efficient manner. The introduction to the handbook notes as follows:

> With the dispersal of office copiers throughout Government agencies, the need for a good hard look at the economy and effectiveness of office copying services has become increasingly apparent. The uncontrolled acquisition and use of office copying equipment has often re-

sulted in uneconomical mismatches of user requirements with machine capabilities and wasteful practices in operating copying facilities.

The introduction goes on to say that large organizational units should make studies of needs for equipment before making substantial investments. It is further noted:

> Where such studies have not been made, an inquiry into the existing copying facilities will offer a high potential for savings. As a minimum, a goal of 10% reduction in overall copying and related paperwork costs would be feasible. This handbook has been prepared to guide managers and others responsible for office copying in providing economical and effective copying service which meets user requirements.

(b) The "Foreword" to the handbook notes in part:

> The impact of document copiers on Federal operations has been substantial just as it has been in commerce and industry. At this writing there are at least 202 models of copiers available from some 37 different manufacturers or distributors. The United States Government alone has installed approximately 55 thousand machines and the yearly cost of office copying is estimated at 80 million dollars. An increasing number of cost-conscious executives are concerned about the predictions that this cost could double within the next 5 years.

(c) Chapter III of the handbook is entitled "Legal Aspects" and reads as follows:

> **Copying Laws**
>
> Copying laws are almost in the same category as speed limit laws—people forget they are there. Although the former involves much less risk than the latter, the penalty can be much greater. Most documents which are prohibited by law from being copied have their source in State or Federal Government. A partial listing is shown in figure 1. In case of doubt, legal advice should be obtained.
>
> **Copyright Laws**
>
> The most frequently violated law is the Copyright Law: namely, that law which prohibits the copying of copyrighted material without permission.
>
> The Copyright Law is intended to protect the publisher or author from plagiarism. It gives him the right to say who may reproduce his written or published work, and to demand payment for it. However, the current

widespread use of copying machines in reproducing literary works goes beyond the question of plagiarism. It is beginning seriously to affect the sale of published works, such as magazines, textbooks, and technical papers. Prior to this time, a user of such works desiring to have possession of a copy was obliged to purchase the publication if he could not borrow it for an indefinite period. Today, it is relatively simple to make copies of almost any printed matter by means of the office copier.

Because the copier has made it easy to reproduce published works, extra precaution is necessary. Where a notice of copyright is shown, either on the work itself, or by a general statement in the publication, the law is clear: it may not be copied unless permission of the publisher or author is obtained. Where doubt exists as to whether or not an item is copyrighted, the legal officer should be consulted.

Figure 1, accompanying Chapter III, is entitled "Material That May Not Be Copied" and notes in part:

1. Congress, by statute, has forbidden the copying of the following subjects under certain circumstances. There are penalties of fine or imprisonment imposed on those guilty of making such copies.

* * * * *

d. Copyrighted material of any manner or kind without permission of the copyright owner.

* * * * *

43. (a) The Board of Regents of NLM (finding 20(a)), at several meetings in 1957, considered the problems of copyright with respect to the operations of NLM. The minutes of those meetings are not in evidence. However, such minutes are discussed in a letter dated December 29, 1965, from Abraham L. Kaminstein, Register of Copyrights, to The Honorable John L. McClellan, United States Senate, as follows:

* * * * *

The new law amended a 1944 Public Health Service Act, which in 1956 was further amended by the transfer of the Armed Forces Medical Library to the newly established National Library of Medicine. The Act provides, *inter alia*, (42 U.S.C. 276) that the Surgeon General shall "make available, through loans, *photographic or other copying procedures or otherwise*, such materials as he deems appropriate . . ." [Italics supplied] The 1956 amendment to the Public Health Service Act also pro-

vides for the establishment by the Surgeon General of a Board of Regents, which as a part of its duties is the [to?] prescribe "rules under which the Library will provide copies of its publications or materials." Since the provisions of section 398 are basically no different from the provisions of the 1956 amendment, it may be of interest to ascertain the administrative interpretation of that earlier copying provision.

A study of the minutes of the Board of Regents discloses that the agenda for the very first meeting of the Board, on March 20, 1957, included the distribution of a paper entitled Considerations for the Formulation of Loan Policy (of the National Library of Medicine). That paper contains a clear recognition of the copyright problem:

> "To start with, it must be pointed out that there are legal restrictions to the unlimited copying of published works; restrictions which are vague in some respects but which have been interpreted fairly definitely in most. The two most important interpretations for this problem are that whole works may not be copied and that multiple copies may not be made."

This policy paper was the subject of discussion at the meeting of the Board on April 29, 1957, at which the recommendations were approved. It is significant that the minutes of that meeting disclose the following:

> "Dr. Mumford [the Librarian of Congress] raised the question of copyright restrictions. It was stated that while the recommended new policy would not obviate the copyright problems, it would not raise more, and probably raise fewer difficulties in this area than does the current policy."

Further evidence that the Board was aware that copyright problems existed appeared in the minutes of the Board meeting for September 23, 1957, in the following notation:

> "The Director [of the National Library of Medicine] expressed his concern 'with the continuing vexing problem of copyright restrictions.' He indicated that the Library is proceeding as circumspectly as possible, but that it is possible, if not indeed probable, that the years would bring, sooner or later, a test of the issue in the courts . . . The Director took pains to indicate that despite the difficulties of the situation it seemed clear to him that the Library could do no other than pursue its present course, since a very large part, if not the major part, of the Library's services is dependent upon it."

> The foregoing would appear to indicate that, from the outset of the establishment of the National Library of Medicine, there has been an awareness of the existence of copyright restrictions with respect to the use of the copyrighted works in its collections. Nowhere does it appear that the policy-making body, the Board of Regents, considered that the above-quoted provision authorizing the Surgeon General to make the material in the Library available by "photographic or other copying procedures" was in any way in derogation of the rights granted under the copyright law to the proprietor of the copyright. On the contrary, the evidence indicates that the Library attempted to formulate a policy that would take due regard of the provisions of the copyright law.

* * * * *

(b) In 1957, the then-Director of NLM, in discussing the problems created by NLM's policy of providing free photocopying services, stated as follows:

> Let us now take a critical look at what has happened under these policies. Free photocopying has developed beyond reasonable bounds. For example, in a recent study conducted over a two month period, it was found that over 50% of all requests received could be filled by photocopying journal articles from 125 common journal titles of the last five years.
>
> On the face of it, this is a need which the printing press, not the camera, is designed to fill. When a request from New York City is received for a photocopy of an article which appeared in last month's JAMA, it is apparent that the library is being treated as a cheap and convenient reprint service, and not as a library. It is felt NLM should not run a copying service *per se;* NLM must operate as a library, and all photocopying done should be an extension of normal library operations.

This statement was made in 1957 with reference to policies then in effect, before adoption of NLM's present policies.

44. The Library of Congress operates a photoduplication service by which it provides photocopies of documents for a per-page fee. In 1965, electrostatic positive prints (Xerox) were provided at from 16 cents to 85 cents per sheet, depending on the quantity ordered and other factors. A brochure issued by the Library of Congress, effective October 1, 1965, stated in part:

> Photocopying is done by the Library under the following conditions:

1. The Library will generally make photoduplicates of materials in its collections available for research use. It performs such service for research, in lieu of loan of the material, or in place of manual transcription. Certain restricted material cannot be copied. The Library reserves the right to decline to make photoduplicates requested, to limit the number of copies made, or to furnish positive prints in lieu of negatives.

2. Copyright material will ordinarily not be copied without the signed authorization of the copyright owner. Exceptions to this rule may be made in particular cases. All responsibility for the use made of the photoduplicates is assumed by applicant.

There is no evidence to show the circumstances under which the Library of Congress makes "exceptions" to its rule against photocopying copyright materials.

45. The PRINTING MANAGEMENT MANUAL of defendant's Department of Health, Education, and Welfare (in effect in 1962 and 1967) stated as follows with respect to copyright:

* * * * *

A. *General*

Material protected by copyright generally may not be reproduced in any fashion, including photocopying or similar techniques, without the express permission of the copyright proprietor. However, it has been the widespread practice of libraries to have single copies made of copyrighted articles to further scholarly research, without consent of the copyright proprietor. Therefore, Department libraries may make such single copies, but every precaution should be taken to assure that such single copying is done only at the written request of an employee to further scholarly research.

B. *Infringement*

1. Since the Government may be subject to claim or suit for damages, every precaution must be taken to avoid infringement of a copyright by an employee of the Department.
2. Employees should be advised that infringement of a copyright by an employee of the Department, not in the performance of his official duties may subject the employee to a suit for damages.

* * * * *

46. The current and recent practices of NIH and NLM as described in the foregoing findings constitute a fair use.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover and its petition is dismissed.

(Submitted with the Consent of the Parties)

FEB 22 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,

Petitioner,

—v.—

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

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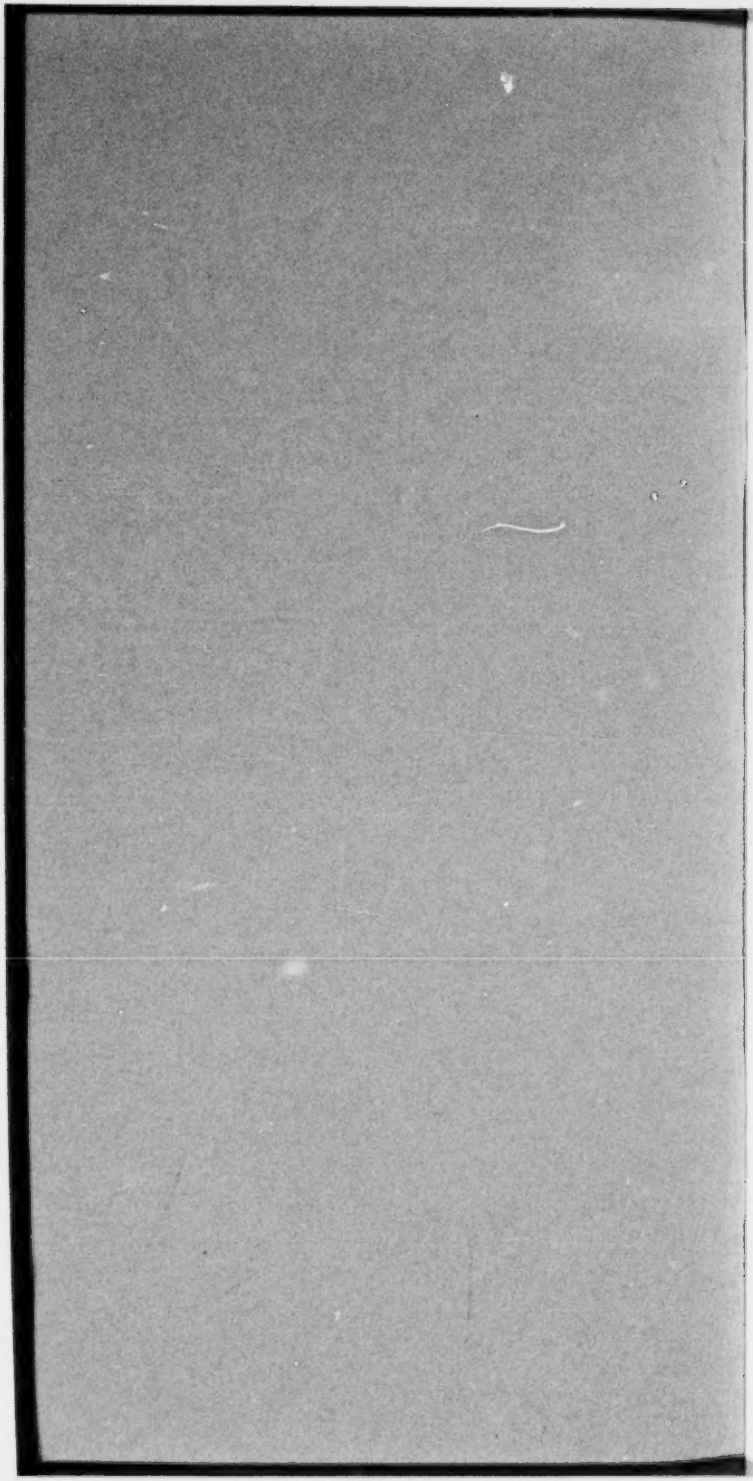

INDEX

PAGE

Interest of The Authors League 1

Preliminary Statement 2

Summary of Argument 2

POINT I—The Serious Questions Created by the Majority Opinion Should be Reviewed by this Court 3

POINT II—The Majority Opinion Radically Altered the Doctrine of Fair Use 4

POINT III—This Court Should Determine Whether the Judiciary Should Resolve Fair Use Issues Without Gratituitously Assuming that Congress Will or Must Legislate Statutory Solutions 7

POINT IV—The Serious Doubt Cast on the Fundamental Right of Authors and Publishers Must be Resolved 8

CONCLUSION 10

TABLE OF AUTHORITIES

F. W. Woolworth & Co. v. *Contemporary Arts, Inc.*, 344 U.S. 228 5

The Williams & Wilkins Company v. *United States*, 487 F.2d 1345 1

STATUTES

	PAGE
17 U.S.C. 1	8

OTHER

House Report No. 83; 90th Congress, 1st Session ..	5, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-

THE WILLIAMS & WILKINS COMPANY,

Petitioner,

—v.—

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

Interest of The Authors League

The Authors League is a national society of professional writers and dramatists; one of its principal purposes is to express their views on fundamental issues of copyright law. The League files this brief (with the parties' consent) because the Court of Claims decision raises questions of enormous importance and grave concern to professional authors.

Preliminary Statement

The majority opinion (487 F.2d 1345) held that the "wholesale, machine copying and distribution of copyrighted material by defendant's libraries on a scale so vast that it dwarfs the output of many small publishing companies "is—'fair use' ". Consequently, the Court denied the plaintiff reasonable compensation for the reprints of its copyrighted articles produced by the libraries. The quoted description of the libraries' activities is Chief Judge Cowen's (487 F.2d 1364); but it accurately delineates the large reprint publishing operation conducted by the government's libraries at substantial cost to the public. "Business-as-usual" payments are made to the Xerox corporation (ironically in the form of per-page "royalties") and to the suppliers of other equipment and materials, and normal compensation is paid to library employees for their services in operating and supervising this wholesale, reproduction service. Judge Cowen's description also fits the "one-at-a-time" reprint publishing operations conducted by other library networks, and by commercial firms, including the highly successful Xerox subsidiary, University Microfilms.

Summary of Argument

The majority opinion made drastic changes in copyright law which must be reviewed by this Court:

1. The opinion radically altered the doctrine of fair use, with serious consequences to authors in many copyright areas.

2. The opinion rejected the explicit request by Congress that the courts decide infringement—fair use

issues in this area on a case-by-case basis, applying established principles of fair use. Instead it gave a draconian answer, apparently based on the premise that Congress would have to legislate a more "reasonable" solution.

3. The opinion cast grave doubts on the scope of the professional author's fundamental right to reproduce copies of his books, articles, stories, plays and poems, intimating that non-profit and commercial reproduction services can now produce and distribute "single copies" of his works without compensating him.

POINT I

The Serious Questions Created by the Majority Opinion Should be Reviewed by this Court.

All the opinions below emphasize the importance of resolving the issues which this Court is asked to review. For the majority, Judge Davis said the suit was a "groundbreaking copyright infringement action" which presented "troublesome problems, which have been much discussed" but never before "determined by a court." (487 F.2d 1346) Chief Judge Cowen, dissenting, stressed the "difficult and perplexing issues presented by this case." (487 F.2d 1363). And Judge Nichols, dissenting, said "However hedged, the decision will be read that a copyright holder has no rights a library is bound to respect. We are making the Dred Scott decision of copyright law." (487 F. 2d 1366)

Unless the serious questions raised by these opinions are resolved now by this Court, authors, publishers, library networks and other users of copyrighted works will be put

to large expense in litigation and appeals, as trial courts grope to apply the radically altered principles of the majority opinion. The long-awaited Copyright Revision Bill, whose enactment is by no means assured, would not resolve these issues. Indeed its pertinent provisions were drawn on the premise that this Court would do so.

POINT II

The Majority Opinion Radically Altered the Doctrine of Fair Use.

As Judge Cowen and Trial Judge Davis demonstrated, the four established criteria of fair use do not support the majority's conclusion. However, it made far-reaching changes in the doctrine. For example, although the libraries engaged in the wholesale production* of "exact duplicates of (and substitutes for) the original articles", the majority refused to apply the cases and authorities which held that "wholesale copying . . . without more, defeats the defense of fair use." (487 F.2d 1366)

Moreover, the majority rejected the most important criterion—the effect of the wholesale, systematic production of copies on the "potential market" for the plaintiff's articles; i.e., the inhibitive effect, in the future, on the sale of additional subscriptions and the sale of "single-copy"

---

* "Single copy" is a euphemism. The libraries produce a copy of an article to fill each request. If one hundred individuals order a copy of the same article, the library produces 100 "single copies", one-at-a-time, to fill each order. Under the majority's opinion, the libraries could make 10, 100, 1000 or more copies of the same article in this manner without compensating the plaintiff.

reprints by plaintiff's licensed reproduction service. The primary importance of "future market" effect as a fair use criterion under the decisional law is emphasized by the House Judiciary Committee discussion of the doctrine in its Report on the 1967 Copyright Revision Bill: "Isolated instances of infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented." (p. 35, House Report No. 83, 90th Cong., 1st Session). For that very reason this Court has stressed that damages are awarded to discourage future incursions, even though the infringement at issue—standing alone—is "uninjurious and unprofitable." *F. W. Woolworth & Co.* v. *Contemporary Arts., Inc.*, 344 U.S. 228, 233.

The government libraries' wholesale reproduction of copies has the inherent and inevitable effect of "aggregating" a vast number of individual infringements. Moreover, this systematic one-at-a-time reproduction of articles is designed to free the libraries it serves from purchasing subscriptions to periodicals which contain articles desired by their patrons. The wholesale, systematic library production of single-copy reprints is becoming, in itself, a separate medium for disseminating articles. And it only requires one or two subscriptions to periodicals, by a few library reproduction centers. As the opinions of Judge Cowen and Trial Judge Davis establish, the record amply supports the Trial Judge's findings of both actual damages and potential injury to the plaintiff. It is imperative that this Court review the several changes in the doctrine of fair use wrought by the majority opinion.

One of these is the majority's expansion of the doctrine to implement its socio-economic judgment that not one cent

of the substantial public funds given for library reproduction activities should go to compensate plaintiff for the reprints of its articles. As Judge Cowen indicated, this judgment contradicts the "economic philosophy" underlying the copyright clause of the Constitution. (487 F. 2d 1372) Ostensibly, the majority contended that medical science would be injured if library reproduction of articles was "stopped." But as Judges Cowen and Nichols made clear, the "stopping" of copying was a spurious issue. The Court of Claims could not enjoin the defendant's libraries from continuing to reproduce copies of plaintiff's articles. And all plaintiff sought was reasonable compensation, to be set by the Court. Such payments would not have "stopped" library copying. The libraries' reproduction services operated despite vastly greater payments to the Xerox Corporation, other suppliers and library employees—all for the purpose of producing reprints of plaintiff's articles and other copyrighted works. The Xerox Corporation, for example, received a specified fee for each page of each copy of plaintiff's articles produced by the government libraries. But unless the plaintiff had selected the articles from a mass of manuscripts, edited them, set them in type, printed them, bound them and distributed them—the Xerox machines could only have churned out blank pages.

POINT III

This Court Should Determine Whether the Judiciary Should Resolve Fair Use Issues Without Gratituitously Assuming that Congress Will or Must Legislate Statutory Solutions.

The majority opinion's predominant theme is the "need for Congressional treatment of the problems of photocopying." (487 F.2d 1363) It reflects the opinion's uneasiness at refusing to apply the established principles of fair use, and the resulting inequity inflicted on the plaintiff. And it invites, even implores, Congress to legislate a solution more reasonable than the majority's draconian decision; indeed, the opinion seems premised on the assumption that Congress will do so.

However, Congress has spoken on this point. In its report on the 1967 Copyright Revision Bill, the House Judiciary Committee flatly rejected the suggestion of a library copying exemption, such as the Court of Claims has "legislated"; and the Committee also rejected any other legislative solution. (p.36, House Report No. 83; 90th Congress, 1st Session). In complete contradiction to the majority opinion, the Judiciary Committee said:

> "Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the *courts* must be free to adapt the doctrine to particular situations on a case-by-case basis." (p. 32) (emphasis added)
>
> * * *
>
> ". . . the Committee does not favor a specific [legislative] provision dealing with library photocopying.

> Unauthorized library photocopying, like everything else must be judged a fair use or an infringement on the basis of all the applicable criteria and the facts of the particular case." (p. 36).

Had the four majority judges reached the same conclusion as the three dissenting judges and the trial judge, the plaintiff would have received reasonable compensation; and the libraries would continue their systematic, wholesale reproduction of its articles. Furthermore, with their respective interests protected, both sides probably would have followed the course prescribed by the House Judiciary Committee—to voluntarily establish "reasonable arrangements . . . providing workable clearance and licensing conditions . . ." (p. 36)

POINT IV

The Serious Doubt Cast on the Fundamental Right of Authors and Publishers Must be Resolved.

To buttress its conclusion of fair use, the majority contends that the verb "copy" in Section 1(a) of the Copyright Act* may not include the production of "single copies" of books, periodicals, monographs, plays and sheet music as distinguished from paintings, photographs, maps and other graphic works. Obviously, the Xerox machine itself cannot be the basis for the distinction. At one touch of the button it can produce anywhere from 1 copy to 999 copies. And like a letter press, offset press or other reproducing device, it reproduces pages containing the text as originally set by

* Granting the copyright owner "the exclusive right (a) to print reprint, publish, copy and vend the copyrighted work."

any one of a variety of typesetting machines. What the majority suggests is that when the Xerox machine—or for that matter a letter press or other device—reproduces only one copy of a copyrighted work at a time, that reproduction may not violate the copyright owner's rights under the present law.

The opinions of Judge Cowen and Trial Judge Davis discuss the cases and authorities which completely refute the majority's theory. But the serious doubts it may create must be resolved by this Court to prevent widespread injury to authors and publishers. Commercial reproduction services now produce and distribute "single copies" of copyrighted books, periodicals, articles, and other writings, using the same Xerox proces employed by defendant's libraries, under license from the copyright owner. According to the theory suggested by the majority, vast duplication of copyrighted works could be carried on by commercial and non-profit reproduction centers—creating an accumulation of single copies of the same work, made at different times —without the copyright owner's permission and without compensating him.

The Authors League respectfully submits that the plaintiff and concerned *amici curiae* are entitled to a review of the Court of Claims decision, so that they may demonstrate the fallacy of its disastrous theory.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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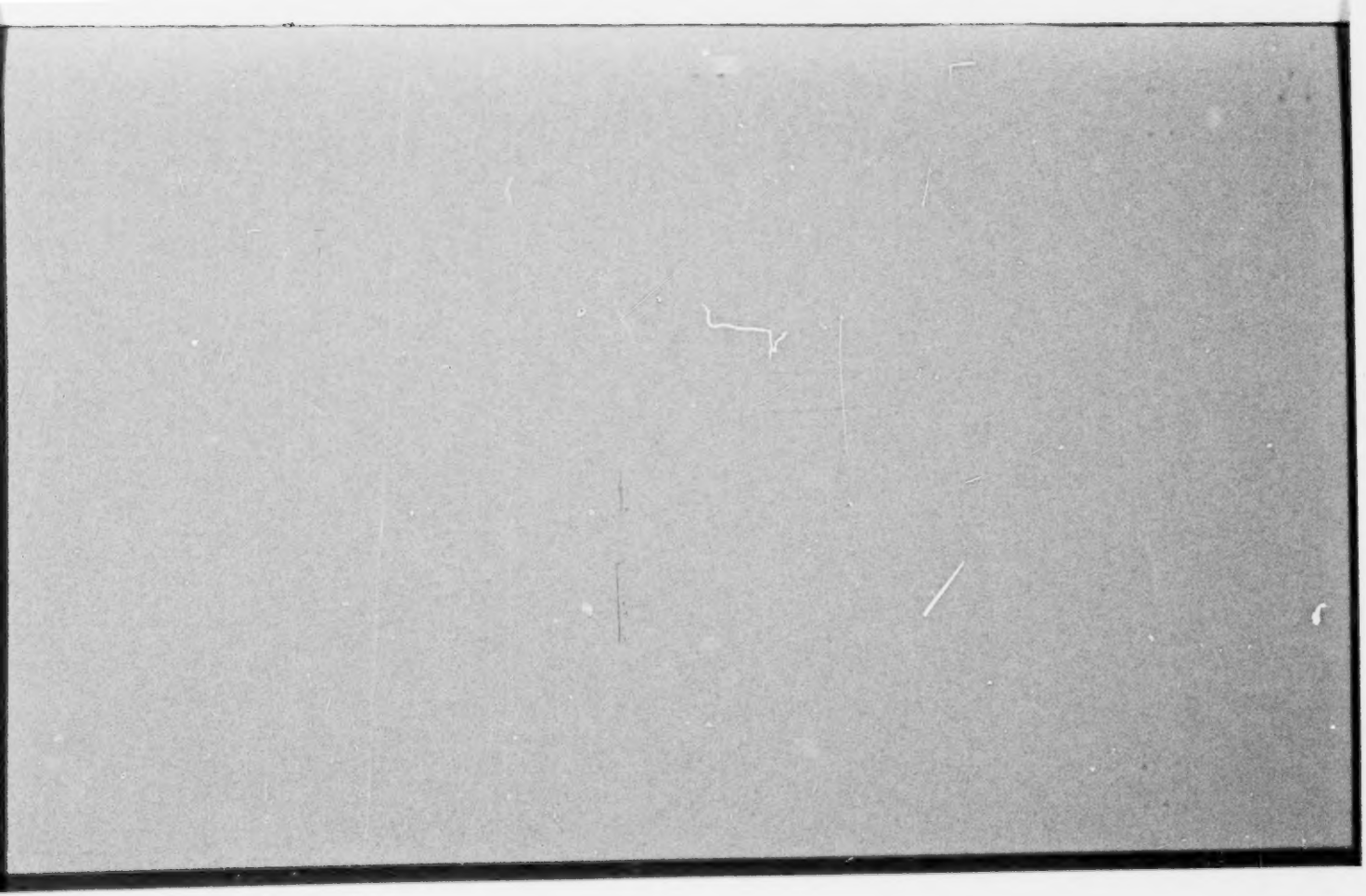

COURT, U. S.

FILED

FEB 22 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-1279

THE WILLIAMS & WILKINS CO.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

BRIEF AMICI CURIAE FOR AMERICAN SOCIETY FOR TESTING AND MATERIALS AND NATIONAL COUNCIL OF TEACHERS OF MATHEMATICS.

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BRIEF AMICI CURIAE FOR AMERICAN SOCIETY FOR TESTING AND MATERIALS AND NATIONAL COUNCIL OF TEACHERS OF MATHEMATICS.

With the consent of both parties, the AMERICAN SOCIETY FOR TESTING AND MATERIALS and NATIONAL COUNCIL OF TEACHERS OF MATHEMATICS respectfully submit this Brief in support of the grant of the Petition for Certiorari.

The letters of consent have been filed with the Clerk of this Court.

With the advent of automatic copying machines such as of the electrostatic type (Xerox), NIH in 1970 made 86,000 Xerox copies constituting 930,000 pages. In 1968, NLM distributed 120,000 copies of journal articles totaling about 1.2 million pages (Dissenting Opinion) page 31. To

merely state the number of Xerox copies made without any payment to the proprietor or owner of the copyright is to dramatize the importance of the question it is believed should be decided by this Court. The question really resides into whether or not the advent of automatic copying machines has repealed the direct language and intent of the Copyright Act.

That such question transcends the interests of the litigants is demonstrated by the activities of organizations such as ASTM and NCTM.

American Society for Testing and Materials.

American Society for Testing and Materials is a scientific organization formed in 1898 for the purpose of promoting knowledge of the materials of engineering and standardizing specifications and methods of use. It is a nonprofit corporation having tax-exempt status as a charitable organization. At the present time the Society has more than 20,000 members. These include individuals, corporations, associations, governmental departments, universities and other bodies, technically qualified to carry on the work of the Society. At the present time ASTM has on hand and for sale standardizing specifications for materials and methods of testing such materials in excess of 4,700 leaflets. Nearly 75% of its income is derived from the sale of its publications notwithstanding the Society freely grants to scholars, engineers and scientists the right to reference, to extract, or to use selected portions of its publications without charge. However, since the early 1920's a reasonable charge is made for copies of entire documents for reprints, whether they be single or multiple copies. Accordingly, if each of its approximately 50,000 customers were to each make one copy of an ASTM document, and without payment for the privilege, the loss to the Society would be severe.

AMERICAN SOCIETY FOR TESTING AND MATERIALS submits that the public interest will be best served by grant of the Petition for Certiorari.

National Council of Teachers of Mathematics.

NATIONAL COUNCIL OF TEACHERS OF MATHEMATICS (NCTM) was organized in 1920. Its purpose is to assist in promoting the interests of mathematics in America and to vitalize and coordinate the work of local organizations of teachers of mathematics. NCTM, the only organization of its type, has had a major influence on the teaching of mathematics. Outstanding persons in mathematics education have been leaders and participants in its program. It has served as an agency for both the coordination and stimulation of major efforts to improve the teaching of mathematics.

NCTM publishes four journals: *The Mathematics Teacher; The Arithmetic Teacher; The Mathematics Student Journal;* and *The Journal for Research in Mathematics Education.* NCTM also publishes yearbooks on particular problems and numerous books and pamphlets on a wide range of topics. It has 47,000 individual members with 30,000 institutional subscriptions to *The Mathematics Teacher* and *The Arithmetic Teacher.*

NCTM is interested in this suit because of its belief that reasonable compensation from photocopy users is vital to the long-range economic health of specialized scholarly journals such as the ones published by NCTM. Continued publication of these journals provides to teachers and their students the most significant type of access to scholarly papers in their respective fields.

NCTM accordingly joins in this brief in support of the grant of the Petition for Certiorari.

CONCLUSION.

It is believed that sufficient reasons have been presented in petitioner's Petition for Writ of Certiorari together with those here presented to justify grant of the Petition.

Respectfully submitted,

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SUPREME COURT, U. S.
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ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF AMICUS CURIAE OF ASSOCIATION OF AMERICAN PUBLISHERS, INC. AND THE ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INCORPORATED

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TABLE OF CONTENTS

PAGE

Questions Presented 2

The Interest of AAP and AAUP 2

Statement of Facts 2

ARGUMENT:

I—The Court misread Section 1 of the Copyright Act 4

II—The Court misunderstood Section 101 of the Copyright Act 5

III—The Court misunderstood and misapplied the Fair Use Doctrine 6

Conclusion 8

IN THE

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ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF AMICUS CURIAE OF ASSOCIATION OF AMERICAN PUBLISHERS, INC. AND THE ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INCORPORATED

This brief is submitted jointly by Association of American Publishers, Inc. and The Association of American University Presses, Incorporated (AAP and AAUP respectively), with Petitioner's and Respondent's consent.

AAP is a trade association of book publishers in the United States. Its 260 member companies and subsidiaries are believed to produce 80% or more of the dollar volume of books published in the United States. Some of its members also publish scientific and technical journals. The Williams & Wilkins Company is not an AAP member.

AAUP is a not-for-profit educational membership corporation. Its 69 regular and 7 international members are

scholarly publishing divisions of colleges and universities and of other educational institutions located primarily in North and South America.

Questions Presented

1. Does the operation of comprehensive library duplication systems providing each year, one at a time to those who request them, thousands of photocopies of copyrighted articles in their entirety infringe the rights of the nonconsenting owners of the copyrights to these articles?

2. If so, is infringement avoided because the libraries are non-profit institutions, the copied articles are scientific studies useful to the work of the requesting researchers, and neither the libraries nor the researchers obtain commercial gain from the making of the photocopies?

3. If infringement would be avoided under the facts as stated in question 2, would the result be otherwise if 12% of the requests come from pharmaceutical companies and other private sector commercial organizations?

The Interest of AAP and AAUP

The interest of AAP and of AAUP in this case is twofold. It is to correct the Court of Claims' erroneous conclusions with respect to the photocopying practices of the National Institutes of Health and the National Library of Medicine (NIH and NLM respectively), which by implication affect all journal publishers. But even more importantly, it is to correct that Court's erroneous construction and application of basic principles of copyright law which threaten the operation of every segment of the publishing industry, profit and nonprofit alike.

Statement of Facts

NIH operates a central library serving 12,000 people, 4,000 of whom are professionals. It subscribes for two

copies of the Williams & Wilkins journals in suit, one copy staying in the library reading room and the other circulating among interested personnel. Demand for access is usually not met by the subscription copies and NIH therefore runs a comprehensive photocopying service for the benefit of its research staff to supply that demand. In 1970 NIH filled almost 86,000 requests, comprising about 930,000 journal pages.

NLM is a "librarians library," providing photocopies of journal articles to other libraries, government institutions, schools, hospitals, research foundations and private physicians. It also provides the same service to commercial organizations. In 1968 it supplied about 120,000 photocopies of journal articles comprising about 1.2 million pages. About 12% of these requests came from private or commercial organizations, particularly drug companies.

The Trial Judge, finding that the libraries operate comprehensive duplication systems constituting in essence a reprint service which supplants the need for journal subscriptions, held that the Williams & Wilkins copyrights in suit had been infringed and that Williams & Wilkins was entitled to be compensated therefor.

The Court of Claims reversed in a four to three decision, with two dissenting opinions. It found not merely that infringement of the Count I to Count VIII articles* had not been proved but that photocopying in the form done by NIH and NLM is fair use and should be accorded the same fair use immunity which the Court believed is available to a scholar who copies by hand for his own use.

In deciding the case on this broad ground the Court misread the copyright law and misunderstood and misapplied the judicially created doctrine of fair use.

---

* Defendant conceded that within the pertinent accounting period, NIH and NLM had made at least one photocopy of each of the eight articles pleaded respectively in Counts I to VIII.

ARGUMENT

I.

The Court misread Section 1 of the Copyright Act.

The Court expressed "solid doubt" and "grave uncertainty" whether the copyright law forbids the "copying" of books and periodicals.

It expressed this doubt because of the distinction it found in the earlier Acts between the proscription against the *copying* of photographs, paintings and drawings and the *printing and publication* of books.

The current Act, however, (17 U.S.C. § 1, in effect since 1909) draws no such distinction, if any formerly existed. It gives the copyright owner the exclusive right

> "to print, reprint, publish, copy and vend the copyrighted work."

These are repetitive terms as the 1961 Report of the Register of Copyrights noted,* conferring the twofold right to *make* copies and to *publish* copies; printing and reprinting being "modes of copying," and vending "a mode of publishing." As was recently stated:

> "Of the uses to which the author (or his successor as the copyright owner) is given the exclusive rights, the most basic are the making and distribution of copies of the work."**

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* Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, House Committee on the Judiciary, 87th Cong., 1st. Sess., 21 (July 1961).

** Goldman, "Copyright as It Affects Libraries: Legal Implications", COPYRIGHT, Current Viewpoints on History, Laws, Legislation at 38 (A. Kent & H. Lancour eds. 1972). Mr. Goldman at the time was General Counsel to the Copyright Office. The views he expressed are his own and do not necessarily reflect those of the Copyright Office.

There is no basis for and the Court was clearly wrong in drawing a distinction between unauthorized printing and the unauthorized photocopying of a book or periodical.

II.

The Court misunderstood Section 101 of the Copyright Act.

The Court in finding that plaintiff had failed to show that NIH's and NLM's unauthorized use of its copyrighted material had damaged it and hence that such use was non-infringing simply misunderstood the relevant portions of the Copyright Act.

§ 1, as noted above, gives the copyright owner the exclusive right to make copies of the copyrighted material. One who makes unauthorized copies of the material therefore infringes the copyright, subject to the application of the fair use doctrine which we discuss in the succeeding point.

§ 101 provides that an infringer shall be liable to pay to the copyright proprietor, "*in lieu of actual damages,*" such damages as the court shall deem just. And 28 U.S.C. § 1498(b), under which this suit is brought, provides that whenever copyright is infringed by the United States, the copyright owner may sue the United States for reasonable compensation.

The issue to be determined in the first instance, therefore, is infringement and not damage. Infringement is not dependent on a showing of damages; if infringement is found, damages or compensation whether actual or statutory follow as a matter of course.

The Court applied a different standard. It said that there was inadequate reason to believe that plaintiff was or would be harmed substantially by NIH and NLM photocopying practices and hence had shown no infringement. In so doing, it employed erroneous circular reasoning and misapplied the governing statutes.

III.

The Court misunderstood and misapplied the Fair Use Doctrine.

The Court, in essence, decided that the NIH and NLM copying practices were protected by the fair use doctrine, fortifying its conclusion by suggesting that a scholar can copy for his own use and therefore that the library as his "ministerial agent" can do so for him. In so deciding, it distorted the fair use doctrine, about which the following should be noted.

(1) Fair use developed as an *author's right* to borrow from or build upon or to criticize earlier works. It was in this context that Mr. Justice Story* enumerated the classic tests which have been restated in S.1361, the proposed copyright revision bill;** namely, the purpose and character of the work; its nature; the amount used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for or the value of the copyrighted work. Each is inter-related to the other, but the effect of the copying upon the copyright owner's potential market for the copyrighted work is recognized as of prime importance.

(2) Borrowing or copying for the purpose of authorship or criticism is not to be confused with the *scholar's* right to copy for his own use. Some justify this kind of copying as a *de minimis* infringement and hence not actionable. Others claim it as a right of the reader implicitly withheld from the exclusive rights granted to the author. Whichever view is taken, it is irrelevant to the issues of this case, which involve copying not by the individual scholar for himself but by the library for thousands.

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* *Folsom* v. *Marsh*, 9 Fed. Cas. 342, No. 4901 (D. Mass. 1841).

** S.1361, 93d Cong., 1st Sess. § 107 (1973).

(3) The library, and particularly a library like NIH or NLM which runs a comprehensive photocopying service for the use of its research staff or for patrons of other libraries, is a new party to the dichotomy. It neither copies for authorship, nor (except for replacement of torn or missing pages) for its own use. It copies to fulfill the requests of others.

Seemingly aware of the basic differences between an author's or a scholar's copying and library copying, the court attempted to rationalize its fair use finding by accepting in part "although not necessarily in full" the concept "that the library is nothing more than the individual requester's ministerial agent."

We cannot better demonstrate the fallacy of the argument than by quoting the following remarks of Chief Judge Cowen in his dissenting opinion:

> "This argument is so far-fetched that the majority balks at embracing it completely. It collides with reality. The libraries installed and operate the reproduction and distribution operation on their own initiative and without any kind of an agreement with the ultimate users of the copies. There is no showing that these alleged—and in the case of NLM generally unknown—principals have any say in the formulation of the policies and practices of the photocopying operation. The libraries decide, without consulting or obtaining the consent of the alleged principals, whether to loan the original of the journals or to provide photocopies. The libraries are no more the agent of the users of the material than are the venders of plaintiff's magazines and the commercial concerns which are licensed by plaintiff to make and sell copies to doctors and scientists. The essential elements of agency are wholly lacking."

(4) The "non-profit" element so much relied on by the Court is not a determinative factor of fair use. In em-

phasizing as it does that neither NIH and NLM nor the researchers who ask for copies attempt to profit or gain financially from the photocopying, the Court compounds the confusion created by its failure to distinguish between author, scholar and library.*

The Court's statement that "copying for scientific purposes (is given) a wide scope" relates to an author who builds upon or criticizes a previously published work. To him, the fourfold test incorporated in § 107 of the Senate revision bill applies, and particularly the fourth test, which is the effect of the use upon the potential market for the work that is copied from.

But even for the author, the non-profit nature of his work is not a factor. He infringes or does not infringe depending upon whether he exceeds or stays within the prescribed criteria, and the determination will be the same whether he plans to sell his work or broadcast it free. A copier who copies not for his own purposes as author, critic or scholar, but for distribution to others, by the very act of copying, infringes unless his copying is authorized by the copyright owner or is excused or condoned by the fair use principle.

Here, the non-profit character of the copier is not only irrelevant; it introduces a note of the absurd. If it were otherwise, no author or publisher would find it possible to produce a work intended for school or hospital or government use.

CONCLUSION

We think that the conclusions of the Court below were wrong and should be corrected. We think it even more important that the Court's erroneous construction and application of basic copyright law and principles should be corrected.

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* It overlooks moreover that 12% of the NLM photocopying was for private sector commercial companies.

We also respectfully suggest that the interests of the parties as well as those of the entire copyright-interested community, publishers, authors, librarians and others, may be served by a determination that library photocopying prior to the date of this Court's decision should be exempt from liability but that photocopying such as that practiced by NIH and NLM after that date shall constitute infringement. Cf. *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, at 106-107 (1971).

Accordingly we respectfully urge that the petition for certiorari be granted.

Respectfully submitted,

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February 22, 1974.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
FEB 25 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS CO., *Petitioner*

v.

THE UNITED STATES, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Claims

BRIEF OF AMICUS CURIAE, THE AMERICAN CHEMICAL SOCIETY, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
INTEREST OF THE AMICUS CURIAE	2
ARGUMENT	6
CONCLUSION	16
APPENDIX A:	
Letter of Permission from Respondent	1a
Letter of Permission from Petitioner	2a

AUTHORITIES CITED

CASES:

Arkansas Valley Industries v. *Freeman*, 415 F.2d 713 (8th Cir. 1969)	9
Caminetti v. *United States*, 242 U.S. 470 (1917)	9
Helvering v. *Hammel*, 311 U.S. 504 (1941)	9
Mazer v. *Stein*, 347 U.S. 201, 219 (1954)	12
Schmid v. *The United States*, 436 F.2d 987 (Ct. Cl. 1971), *cert. denied*, 404 U.S. 951	8
Washington Pub. Co. v. *Pearson*, 306 U.S. 30, 36 (1939)	12

STATUTES:

17 U.S.C. § 1(a)	7
17 U.S.C. § 3	7

OTHER:

Bonn, George S., "Science Technology Periodicals," Library Journal 88(5), 954-8, March 1, 1963	15
Charter of The American Chemical Society, P.L. 358, 75th Cong., 1st Sess. (1937)	2
Omnibus Copyright Revision, Comparative Analysis of the Issues, Cambridge Research Institute, American Society for Information Science, August 1973	12
United States Constitution, Article I, § 8	11

IN THE

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THE WILLIAMS & WILKINS CO., *Petitioner*

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THE UNITED STATES, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Claims

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BRIEF OF AMICUS CURIAE, THE AMERICAN CHEMICAL SOCIETY, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The American Chemical Society submits this brief as *amicus curiae* in support of petitioner's petition for a writ of certiorari to the United States Court of Claims. Your amicus has obtained consents to the filing of this brief from both the petitioner and the respondent, which consents are attached hereto as Appendix A and made a part hereof.

INTEREST OF THE AMICUS CURIAE

The American Chemical Society is incorporated by the Federal Congress as a non-profit, membership, scientific, educational society composed of chemists and chemical engineers, and is exempt from the payment of federal income taxes under Section 501(c)(3) of the Internal Revenue Code of 1954, as amended.

As of December 31, 1973, the American Chemical Society consisted of approximately 110,000 such above described members. Its Federal Charter was granted by an Act of Congress in Public Law No. 358, 75th Congress, Chapter 762, 1st Session, H.R. 7709, signed into law by President Franklin D. Roosevelt on August 25, 1937, to become effective from the first day of January, 1938.

Section 2 of the Act is as follows:

> "Sec. 2. That *the objects* of the incorporation *shall be to encourage in the broadest and most liberal manner the advancement of chemistry* in all its branches; *the promotion of research in chemical science and industry;* the improvement of the qualifications and usefulness of chemists through high standards of professional ethics, education, and attainments; *the increase and diffusion of chemical knowledge; and by its* meetings, professional contacts, *reports, papers,* discussions, and *publications, to promote scientific interests and inquiry,* thereby fostering public welfare and education, aiding the development of our country's industries, and adding to the material prosperity and happiness of our people." (emphasis supplied)

Its Federal Incorporation replaced a New York State Charter, which had been effective since November 9, 1877.

One of the principal objects of the Society, as set forth in its Charter, is the dissemination of chemical knowledge through its publications program. The budget for the Society for the year 1974 exceeds $39,000,000, of which more than $22,000,000 is devoted to its publications program.

The Society's publications program now includes twenty periodicals varying from scholarly journals, containing reports of original research from such fields as medicinal chemistry, biochemistry, and agricultural and food chemistry, to a weekly newsmagazine designed to keep chemists and chemical engineers abreast of the latest developments affecting their science and profession. In addition, the Society is the publisher of CHEMICAL ABSTRACTS, the world's most comprehensive scientific abstracting and indexing service. The funds to support these publications are derived chiefly from subscriptions.

The journals and other published writings of the Society serve a most important function, namely: the increase and diffusion of chemical knowledge and related purposes of the Society. Revenues they generate permit the Society to support and continue its publications program in furtherance of its Congressional charter to serve the science and industry of chemistry. The protection of copyright has proved an important factor in the growth and development of the scientific-publishing program of the Society.

The Society's publications and their periodicity of publication, circulation, and the cost to subscribers, as of January 1, 1974, are as follows:

Publication	Periodicity of Publication	Circulation	Rates Members	Non-members
Chemical Abstracts	Weekly	Company & Individual 3,170 Universities 2,408		$2,900.00 $2,400.00
Constituents & Derivatives of Chemical Abstracts	No set schedule	In excess of 12,000		Range from $ 35.00 to 100.00
Journal of American Chemical Society	Bi-weekly	15,613	$22.00	$ 66.00
Chemical & Engineering News	Weekly	121,562	5.00	9.00
Analytical Chemistry	Monthly	30,898	5.00	7.00
The Journal of Physical Chemistry	Bi-weekly	5,262	20.00	60.00
Journal of Agricultural and Food Chemistry	Bi-Monthly	4,885	10.00	30.00
The Journal of Organic Chemistry	Bi-weekly	9,067	20.00	60.00
Journal of Chemical and Engineering Data	Quarterly	2,144	15.00	45.00
Journal of Chemical Documentation	Quarterly	1,946	7.00	21.00
Biochemistry	Bi-weekly	6,711	20.00	60.00
Inorganic Chemistry	Monthly	5,000	18.00	54.00
Journal of Medicinal Chemistry	Monthly	3,914	15.00	45.00
Chemical Reviews	Bi-monthly	5,581	13.00	39.00
Chemistry	Monthly	32,165	6.00	6.00
I&EC Process Design and Development	Quarterly	6,672	7.00	21.00
I&EC Fundamentals	Quarterly	6,702	7.00	21.00
I&EC Product Research and Development	Quarterly	6,763	7.00	21.00
Environmental Science and Technology	Monthly	26,108	6.00	9.00
Macromolecules	Bi-monthly	2,307	12.00	36.00
Chemical Technology	Monthly	13,537	9.00	18.00
Accounts of Chemical Research	Monthly	11,588	7.00	21.00

Additionally, the Society publishes on a non-periodical basis the following:

Directory of Members

Abstracts of Meeting Papers

Advances in Chemistry Series

Seidell's Solubilities of Inorganic and Organic Compounds

Specifications and Test Methods for Laboratory Reagent Chemicals

Collective Indexes to Chemical Abstracts and Society Journals

Such other books, pamphlets, and reprints as may be authorized by the Board of Directors.

The twenty primary periodical publications of the Society produce more than 43,000 pages a year, and CHEMICAL ABSTRACTS produces more than 127,000 pages a year. Its abstracts number in excess of 380,000 annually and its documents indexed in excess of 410,000.

From the foregoing, it is obvious that the amicus has a deep and abiding interest in the outcome of this case. It should also be obvious why the amicus supports the position of the petitioner in the case; it is abundantly clear that, in working toward the objective of the advancement of the science and technology of chemistry, the most effective possible dissemination of information is a primary requirement. In order to effect this, the American Chemical Society, operating as a non-profit society, works to build the best possible record of scientific knowledge related to chemistry and to find ways to get that knowledge as effectively as pos-

sible into the hands of those who need and use it. On the one hand, there is the problem of cost per user, which the Society endeavors to maintain at a level which will not be a serious barrier. On the other hand, the expenses of doing this are very considerable and they must be met in full or else the system will begin to degenerate. If copying and distribution which bring no return at all to the American Chemical Society are permitted, and if this material is made available so that users need not subscribe to the publications, the result will be a reduction of paid circulation and a smaller base over which to distribute the costs, thus driving up the unit costs, ultimately to unacceptable levels. Such appreciable increases in cost would defeat efforts to maintain the objective of broad and effective dissemination.

This amicus believes that the actions of which the petitioner complains have a deleterious effect on its objects as set forth above.

ARGUMENT

The American Chemical Society supports the position of the petitioner as set forth in its petition and adopts the authorities cited therein. Rule 19 of the Supreme Court Rules indicates that a review of a writ of certiorari will be granted only where there are "special and important reasons." By way of example of the character of reasons which will be considered, Rule 19 sets forth the situation where the Court of Appeals (or the Court of Claims) "has decided an important question of federal law which has not been, but should be, settled by this Court." The questions presented by the present case fall squarely within the purview of Rule 19 of the Supreme Court Rules.

To illustrate, one need go no further than the opening statement by Judge Davis in the majority opinion in the Court of Claims:

> "We confront a ground-breaking copyright infringement action under 28 U.S.C. § 1498 (b), the statute consenting to infringement suits against the United States."

Certainly, the Judge's statement was well taken and quoting again from his opening paragraph, we cite these words:

> "Those issues have never before been mooted or determined by a court."

It is unfortunate that the majority, having started off so well, placed itself in the position of usurping the legislative authority of the Federal Congress by totally ignoring the clear meaning of the copyright law as set forth in 17 U.S.C. § 1(a):

> "§ 1. EXCLUSIVE RIGHTS AS TO COPYRIGHTED WORKS.—Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right;
>
> (a) To print, reprint, publish, copy, and vend the copyrighted work;"

and 17 U.S.C. § 3 providing, in pertinent part:

> "§ 3. PROTECTION OF COMPONENT PARTS OF WORK COPYRIGHTED; COMPOSITE WORKS OR PERIODICALS. The copyright provided by this title shall protect all the copyrightable components of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall

> give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title."

Flying in the face of this language, the Court of Claims' majority injected itself as an extraordinary legislature, and in so doing clearly reflected some of the same lobbying pressures which are very properly a part of our constitutionally ordained legislative process. They accepted the view of what some told them the law ought to be, not what it is. They reached an unjustified conclusion, which if it were not so serious would be ludicrous for a superior court of this standing, when they made the statement in the majority opinion:

> "Hopefully, the result in the present case will be but a 'holding operation' in the interim period before Congress enacts its preferred solution."

Having reached that conclusion, we now go back to the point where the Court sets out in its majority opinion eight criteria which lead it to its legislative decision, rather than to an appropriate judicial determination, and as criterion number eight, it cites the practices of foreign countries, whose laws are different from and often contrary to ours, as a reason why it should enact this "holding operation" while waiting for the Congress to act. Such fundamental lack of reasoning represents a wanton disregard for accepted judicial principles in statutory interpretation. This very court as recently as January 22, 1971 in the case of *Schmid* v. *The United States*, 436 F.2d 987 (Ct. Cl. 1971), *cert. denied*, 404 U.S. 951, used this language:

> "We find that the section is clear and unambiguous on its face and is susceptible, on its face, of only one interpretation. The relevant part of the last sentence of section 687(a) provides that

> 'For the purposes of this subsection * * *(2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded * * *.' Congress imposed no express or implied limitation on the applicability of this rounding provision. The clear indication is that, in determining eligibility for readjustment pay and in computing the amount thereof, a period of 6 months or more is counted as a whole year.
>
> But, although we find no ambiguity in the words of the statute, we are not precluded from examining the legislative history underlying the enactment in order to determine whether there is clear and compelling support for the interpretation urged by the defendant. ***See Lionberger*** v. *United States*, 178 Ct.Cl. 151, 157, 371 F.2d 831, 834, *cert. denied*, 389 U.S. 844 (1967). As the Supreme Court has said, '[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'' *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940) (footnotes omitted). After a careful review of the legislative history of section 687(a), we conclude that the support which it lends to defendant's position is not so clear and compelling as to require us to adopt an interpretation of the section inconsistent with the clear import of its terms.''

Stated another way, where the meaning of a statute is clear a court should not question the appropriateness of the statute's provisions and should not substitute the court's language for that expressed in the statute. *Helvering* v. *Hammel*, 311 U.S. 504 (1941); *Caminetti* v. *United States*, 242 U.S. 470 (1917); *Arkansas Valley Industries* v. *Freeman*, 415 F.2d 713 (8th Cir. 1969).

Here the Court of Claims has set aside past judicial interpretations of the copyright law as relating to the doctrine of "fair use." It has set aside the clear meaning of the copyright statute as it relates to copying and has placed itself in a position of acting as an interim legislative body in hopes that the Federal Congress will act on this subject in a fashion which would support the conclusions of the majority in its conjecture regarding future legislative intent. It should be noted here that the Federal Congress has been wrestling with an omnibus copyright revision for the past seventeen years. It is now entering its eighteenth year of such consideration, and no break in the logjam is yet apparent. For the courts of our country so to invest themselves with authority in this field and in this fashion is to lay ourselves open to an insidious and unprecedented invasion of the legislative province by judicial conjecture. We believe there are several other considerations which will impel this Court to entertain this writ of certiorari so that it may have the opportunity to rule on this case which we believe requires reversal and remand with directions to adopt the trial judges' opinion as the finding of the Court. We cannot in saying this pass by the dissenting opinion of Chief Judge Cowen, who most eruditely has disposed of this case in its proper context. Likewise, Judge Nichols in his additional dissent points out the absolutely twisted doctrine adopted by the majority, and we quote from page 69 where Nichols says:

> "However hedged, the decision will be read, that a copyright holder has no rights a library is bound to respect. We are making the Dred Scott decision of copyright law."

This Court need not be reminded of the social and political problems brought upon our country by the mentioned decision.

Review of the Court of Claims' decision is necessary to resolve what appears to be a paradox which has developed regarding whether the "progress of science" set forth in Article I, Section Eight of the United States Constitution will be served better by a decision for the petitioner or the respondent. On page 14 of the majority opinion in the Court of Claims, the Court sets forth three propositions upon which it bases its decision. The first is that the petitioner is not being "substantially harmed." The second is that medicine and medical research will be injured by holding the particular practices to be an infringement; and the third states that until the legislature solves the problem, the Court does not wish to place a risk of harm upon science and medicine. Therefore, two of the three propositions leading to the decision are founded upon the Court's disposition toward protecting and promoting the progress of science and medicine. Your amicus contends that the Court of Claims' decision, if allowed to stand, will have just the opposite effect and will, in fact, retard progress of the sciences. The Court of Claims' minority decisions fully and adequately overcome the fears of the majority that progress in science will be retarded if the complained of use is determined unfair, by showing that what is sought is compensation as required under the statute rather than prohibition of use. Your amicus goes one step farther and states that failure to compensate the copyright owner will ultimately lead to the retardation of progress in science.

Unlike the petitioner herein, your amicus is a non-profit organization whose purposes, as previously set forth, include "the increase and diffusion of chemical knowledge by . . . reports, papers, discussions, and publications." Congress has seen fit to encourage such purposes and in furtherance thereof, has extended to the American Chemical Society and like scientific organizations exemption from federal income tax under Section 501(c)(3) of the Internal Revenue Code of 1954. It was with this same keen interest in the advancement of the sciences and learning that Congress enacted the copyright laws. Protection of an individual's copyright was recognized as essential even prior to the assembling of the Constitutional Convention. At that time, twelve of the thirteen colonies, all but Delaware, already had laws to protect the copyright interests of individuals. The copyright law itself recognizes that protection for an individual's endeavors is the *quid pro quo* for progress in learning and the sciences, and without such encouragement, the growth of our scientific knowledge will be stunted. *Omnibus Copyright Revision, Comparative Analysis of the Issues,* Cambridge Research Institute, American Society for Information Science, August 1973. In *Washington Pub. Co.* v. *Pearson,* 306 U.S. 30, 36 (1954), the Court recognized that these copyrights were "to afford greater encouragement to the production of literary works of lasting benefit to the world" and in *Mazer* v. *Stein,* 347 U.S. 218, 220 (1939), the Court stated:

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of the

> individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'science and useful arts'."

The goals of the American Chemical Society, like the goals of the copyright law, are to encourage progress in science, and the scientific works of the Society and other like organizations will be adversely affected by the decision of the Court of Claims. A review of the previously listed circulation figures of each of the Society's publications shows that only one of the twenty periodicals enjoys a circulation in excess of 32,000. Fourteen of the twenty publications have a circulation of less than 10,000, and eight have a circulation of less than 6,000. Even a few hundred subscribers lost because of the massive infringing practices of the libraries can affect the unit subscription price of the periodical. This problem can best be seen in the case of the Society's CHEMICAL ABSTRACTS service. There are a total of only 5,578 subscribers to this service. The price is $2,900 per year to companies and individuals and $2,400 per year to universities. It takes little mathematical talent to recognize that photocopying of large portions of these periodicals can be accomplished at a fraction of the cost of a subscription.

The request of the American Chemical Society is not to restrict the dissemination of scientific information, for such dissemination is precisely the purpose of the Society. Its complaint is not the loss of profits to the Society, for the Society makes no profits. The appeal of the Society is to allow it to continue to publish its scientific periodicals and be compensated for their dissemination as required by

Congress, so that the proceeds therefrom may be reinvested in further dissemination of scientific knowledge.

Your amicus believes that no better case for review can come before this Court. We do not have here minor sporadic photostatic copying of portions of scientific articles, but rather the wholesale electronic copying of millions of pages per year including primarily the copying of entire articles for free distribution to whoever might ask for them. In no case have the lines been so clearly drawn, and your amicus believes that this is the case for which lawyers, academicians, librarians, and government officials alike have been waiting so that this Court might make some definitive pronouncement concerning a practice which has been and is still without proper judicial guidance since the invention of photocopying equipment.

The electronic revolution is advancing at such a pace that this Court must make a pronouncement on the effect of this new equipment on the existing law before practices are established that would have even more deleterious effects when applied to more advanced electronic equipment as yet not invented. The infringing practices of today will be of even greater consequence to the non-profit scientific societies when mass dissemination of information becomes even easier by the advancement of the electronic processes. It has already been forecast that the printed journal may someday be obsolete to be replaced by instant around-the-world dissemination of information through video display tubes. The law as interpreted today by this Court will have far-reaching implications on these technological advances.

The American Chemical Society disseminates more scientific information in the field of chemistry than any other organization. Its accomplishments in this area have been recognized both by Congress and by other branches of government. Its investments are great from the standpoint of both manpower and dollars. Your amicus believes that this program is a vital service which must be continued. The Society is deeply concerned, however, that the unauthorized use of materials under an increasingly liberal "fair use" doctrine could impair, or even destroy, its ability to generate, publish, and disseminate such scientific information in the future. While the Society in no way seeks to hamper or restrict either the learning process or the use of technological developments and equipment needed to improve the exchange of information, (but rather tries to promote them) it cannot be oblivious to the effects of these developments on the essential financial support needed to continue the publishing function which generates the basic materials.

It is conceded that it would be difficult or impossible to obtain accurate figures to indicate precisely the volume of current uncontrolled copying in terms of subscription losses. It can be shown, however, that this problem is particularly acute in the area of chemical publications. In a study of the copying of technical journals from the New York Public Library, five American Chemical Society journals appeared on the list of twenty-two most copied journals, and ranked two, three, five, twelve, and thirteen respectively. Bonn, George S., "Science Technology Periodicals," Library Journal, 88(5), 954-8, March 1, 1963.

CONCLUSION

The purposes of the American Chemical Society, like the purposes of the copyright law, are to promote progress in science. The eroding of the protection afforded under the copyright law will result in the retarding of the Society's efforts toward progress in science. The erosion caused by the Court of Claims' decision concerning "fair use" will be so swift that the Society cannot afford to accept that decision as a "holding position" until some undetermined date when the Congress takes appropriate action. The present case has all the ingredients necessary for the Court to take an affirmative position on this copyright question which has been essentially without judicial guidance since the invention of photocopying equipment.

Accordingly, the Society reiterates its support of the petitioner and respectfully urges that this Honorable Court grant the petitioner's petition for a writ of certiorari to the United States Court of Claims.

Respectfully submitted,

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Attorneys for Amicus Curiae,
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HANSON, O'BRIEN, BIRNEY,
STICKLE AND BUTLER

Of Counsel

APPENDIX A

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D.C. 20530

January 29, 1974

William J. Butler, Jr., Esq.
Hanson, O'Brien, Birney, Stickle
and Butler
888 Seventeenth Street, N.W.
Washington, D.C. 20006

Re: *The Williams & Wilkins Company* v. *United States*

Dear Mr. Butler:

As requested in your letter of January 28, 1974, I consent to the filing by the American Chemical Society of a brief *amicus curiae* in support of the petition for a writ of certiorari to be filed in the above case.

Sincerely,

/s/ ROBERT H. BORK
Robert H. Bork
Solicitor General

LAW OFFICES
COWAN, LIEBOWITZ & LATMAN, P.C.
200 EAST 42ND STREET
NEW YORK, N.Y. 10017

January 30, 1974

William J. Butler, Jr., Esq.
Hanson, O'Brien, Birney,
Stickle and Butler
888 Seventeenth Street, N.W.
Washington, D.C. 20006

Re: *Williams & Wilkins* v. *The United States*
U. S. Supreme Court: October Term 1973

Dear Mr. Butler:

In response to your request of January 28, the Williams & Wilkins Company hereby consents to the filing of a brief *amicus curiae* by the American Chemical Society on the petition for a writ of certiorari in the above matter.

Sincerely yours,

/s/ ALAN LATMAN
Alan Latman

AL:DM

SUPREME COURT, U. S.

FILED

MAR 6 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,
Petitioner,

v.

THE UNITED STATES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF OF *AMICI CURIAE,* AMERICAN GUILD OF AUTHORS AND COMPOSERS, BEHAVIORAL PUBLICATIONS, INC., EDWIN H. MORRIS & CO., INC., HARCOURT BRACE JOVANOVICH, INC. AND MACMILLAN, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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LINDEN AND DEUTSCH
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JON A. BAUMGARTEN
Of Counsel

TABLE OF CONTENTS

PAGE

Preliminary Statement 1

The Interests of *Amici* Herein 2

Argument:

POINT I—The Constitution's authorization of copyright (Article I, Section 8) is paramount over any other legal interests 4

POINT II—The right to "copy" is a right accorded under the Copyright Act to the proprietors of books and periodicals 5

POINT III—The lower Court's extension of the doctrine of fair use effectively destroys the benefits of copyright 6

Conclusion 9

CASES CITED

Douglas v. *Cunningham*, 294 U.S. 207 (1935) 8

F. W. Woolworth Co. v. *Contemporary Arts, Inc.*, 344 U.S. 228 (1952) 8

Mazer v. *Stein*, 347 U.S. 201 (1954) 5

Rosemont Enterprises, Inc. v. *Random House, Inc.*, 366 F. 2d 303 (2d Cir. 1966), *cert. den.*, 385 U.S. 1009 (1967) 7

Wihtol v. *Crow*, 309 F. 2d 777 (8th Cir. 1962) 7

CONSTITUTION AND STATUTES

United States Constitution
Article I, § 8 ..... 3, 4

Copyright Act (17 U.S.C. § 1 et seq.)
17 U.S.C. § 1(a) 5, 6
17 U.S.C. § 101(b) 7

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF OF *AMICI CURIAE,* AMERICAN GUILD OF AUTHORS AND COMPOSERS, BEHAVIORAL PUBLICATIONS, INC., EDWIN H. MORRIS & CO., INC., HARCOURT BRACE JOVANOVICH, INC. AND MACMILLAN, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This brief is submitted jointly by the American Guild of Authors and Composers, Behavioral Publications, Inc., Edwin H. Morris & Co., Inc., Harcourt Brace Jovanovich, Inc. and Macmillan, Inc. as *amici curiae* in support of the petition for a writ of certiorari. None of the above *amici* are members of the associations also filing *amicus* briefs.

Harcourt Brace Jovanovich, Inc. and Macmillan, Inc. (or their subsidiaries) are major, diversified publishers whose publications include general trade books, textbooks, workbooks, reference works, tests and journals. Behavioral

Publications, Inc. is a publisher of texts and professional, academic and technical journals.

Edwin H. Morris & Co., Inc. is a music publisher whose business includes educational music publishing of sheet music and folios. The American Guild of Authors and Composers is an association of composers and lyricists who license and derive income from the sales of their copyrighted musical compositions in sheet music and folio form.

The Interests of *Amici* Herein

The *amici* herein include two of the largest educational and reference publishers in the country, a highly specialized publisher in the social sciences, one of the leading music publishers, and an association comprised of approximately 2,500 American composers and lyricists. All are copyright proprietors or publishers of copyrighted works* and depend on use of their copyrighted material for their continued economic welfare and livelihood. The decision of the Court of Claims threatens one of their major sources of income.

The *amici* urge this Court to grant certiorari in defense of their rights to create and profit from intellectual property in a private entrepreneurial economy, and to enjoy the fruits of their endeavors under the same rules of law as other producers and manufacturers. This Court is the appropriate forum to define the federal right of copyright originating in the United States Constitution and to determine whether it may be eroded in favor of another group of entrepreneurs manufacturing new reprographic devices.

The Constitution mandates that creators of private intellectual property (authors) be accorded legal protection equal to that accorded to manufacturers (inventors). The

* The American Guild of Authors and Composers represents the interests of its individual members.

decision below, if left standing, will be a milestone for a contrary proposition. The right of manufacturers of machinery such as photoduplicating equipment to be paid for the use of their machines was not questioned by the Court of Claims; it concluded, however, that the public interest cancelled any right of compensation on the part of the creators of intellectual copyrighted works.

The amici respectfully urge this Court to review and correct a decision which is in error as a matter of law, and which by reason of its holding, looseness of language and erroneous reasoning presents a serious threat to the interests of authors and publishers of "scientific", "educational" and all other literary and musical works, as well as to the intellectual and cultural long-term interests of the nation and the national policy inherent in the Constitution (Article I, Section 8).

The Court below purported to limit its holding to the photocopying of articles from scientific journals by the National Institutes of Health (NIH) and National Library of Medicine (NLM). However, the extent of its holding is all-encompassing. To illustrate:

(1) *Library use:* The decision below permitted free duplication of over 200,000 articles in a single year by two libraries. The permitted usage will not be viewed by the thousands of libraries, archives, public information centers and Federal, state and local agencies and school districts throughout the United States as being limited to the two Governmental libraries involved in this suit. The decision permits all such institutions to justify the free and unauthorized duplication of copyrighted materials in a similar manner.

(2) *"Scientific" works:* Although the decision below dealt with certain medical "scientific" works, its very rationale demonstrates that it is and will be construed to be applicable to permit the photoduplication of all scientific and educational materials. Very little, if anything, which *amici* create or publish falls outside this category.

(3) *"Journal articles":* The Court below permitted the wholesale duplication of entire journal articles. Its language in no manner forecloses the reproduction of entire "articles" from encyclopaedias or anthologies, or of separate chapters of textbooks, or manuals.

(4) *"Photcopying":* There is no definition of this term in the decision below that would preclude its application to encompass such sophisticated reproductive techniques as televised or long distance wire or wireless duplication by the transmission of facsimile copies from central information centers to numerous remote individual users. The decision below encompasses every modern technology which can be used to make single copies available to users. It condones the unrestricted on-demand publishing of amici's publications in preemption of their natural markets and customers.

ARGUMENT

POINT I

The Constitution's authorization of copyright (Article I, Section 8) is paramount over other legal interests.

The United States Constitution provides, in Article I, Section 8, that Congress shall have the power:

> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;"

The clear intent of the Constitution is to foster scholarship and creativity in order to enhance the cultural, technical and scientific development of the country. Because we have a private enterprise economy, the constitutional fathers established, and the courts have consistently main-

tained,* that the public welfare is best served by economic encouragement to creators of intellectual property. Neither the creation of ad hoc judicial exemptions to the principle of economic incentive nor the preemption of private proprietary rights in intellectual property can serve the public welfare under the framework established by the Constitution.

The decision of the Court below has perverted the language of the Constitution so that the public welfare is deemed not to be the objective of copyright protection, but merely an adversarial consideration. The Court of Claims invites defendants to argue in every case that, despite the view expressed in the Constitution, the elimination of authors' and publishers' rights best serves the public interest.

POINT II

The right to "copy" is a right accorded under the Copyright Act to the proprietors of books and periodicals.

The Court below expressed a "solid doubt" whether the right to "copy" accorded by Section 1(a) of the Copyright Act applies to books and periodicals. The Court's conclusion on this point must be considered more than mere *dicta* because it expressly considered this doubt to be a "powerful factor" in determining that the activities of respondent amounted to fair use.

The language of the Copyright Act is unambiguous. The right to "copy" a work under Section 1(a) means precisely what it says and is expressly applicable to all copy-

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* E.g., in *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954), this Court said:

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' "

righted works. There exists no meaningful distinction between the "copying" of a work by conventional printing and its duplication by photomechanical means. The latter is no more than a sophisticated and efficient technology of duplicating the printed word. The acts of "copying", "printing" and "reprinting" a work are functionally identical. The term "print" as used in the Copyright Act of 1909 is not to be confined to a Gutenberg press or letterpress or any other type of machine. A Xerox machine is a printing device in any practical sense of the word "print".

The Court also concluded that the other Section 1(a) rights to "print", "reprint" and "publish" are not violated by duplication and distribution in response to single or individual requests. However, the Court's reliance on "single" duplication is entirely unsupported in the Copyright Act and ignores the fact that the aggregate result of "single" copying is "multiple" copies. A large portion of the commercial market for the publications of the amici are for single copies sold through retail outlets.

If on-demand publishing of copyrighted works is not a proscribed form of "copying", "printing", "reprinting" or "publishing", then the copyright proprietor is without protection against such duplication by commercial interests* as well as by the respondent herein.

POINT III

The lower Court's extension of the doctrine of fair use effectively destroys the benefits of copyright.

In holding that respondent's photocopying activities were a "fair use" of petitioner's works, the Court of Claims concluded that such systematic reproduction of copyrighted works is permissible if the copies are ulti-

* E.g., a corporate library or archive providing photocopies to its research staff. Indeed, a substantial number of NLM's photocopies were distributed to private commercial users.

mately used for scientific purposes. The Court entirely misconstrued the function of respondent's photocopying and the concept of fair use. The privilege of copying "for scientific purposes" which has been recognized under the doctrine of fair use pertains only to the quotation from or similar use of portions of a prior work *in the creation of a new work dealing with similar subject matter.* Compare *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 303, 307 (2d Cir. 1966), *cert. den.* 385 U.S. 1009 (1967), with *Wihtol* v. *Crow*, 309 F. 2d 777 (8th Cir. 1962). The Court, however, applied this principle not in furtherance of the independent creation of new works, but to approve respondent's production and distribution of copies of petitioner's own works in the same manner as a bookseller or magazine distributor or, indeed, petitioner and amici themselves.

The Court below also concluded that by characterizing the respondent's activities as fair use it would be ensuring easier and cheaper access to petitioner's works. Although the Court showed a valid concern for the issue of ready access to intellectual property, it confused that concern with unpaid for access. The Court failed to recognize that no Constitutional or statutory rights exist to preempt, without compensation, private literary property for public use.

The majority below also concluded that petitioner had not demonstrated sufficient injury to negate the defense of fair use. The Court's conclusion is unsupportable in a factual context of free distribution of over 200,000 articles a year by respondents. It is illogical to assume that the extensive reproduction and dissemination of free copies of copyrighted works does not supplant the copyright owner's market for the sale of such works. The asserted failure of petitioner to prove specific damage in terms of lost subscriptions or otherwise does not detract from this conclusion.

The crux of the issue, however, is not limited to the precise facts of this particular case. It lies in the

principles of law enunciated by the Court below. Proof of specific damage is simply not a necessary element of copyright infringement. It is generally acknowledged that it is often extremely difficult for a copyright proprietor to prove specific damage. Thus, Section 101(b) of the Copyright Act adopts a policy of statutory damages "in lieu of" actual damages and "even for uninjurious and unprofitable invasions of copyright the Court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy." *F. W. Woolworth Co.* v. *Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952).

Since the statutory provision for "in lieu of" damages cannot be relevant until after a court has found an infringement which is not privileged by fair use, the decision below is in effect a negation of the clear statutory purpose to "give the owner of a copyright some recompense for injury done him in a case where the rules of law render difficult or impossible proof of damages or discovery of profits." *Douglas* v. *Cunningham*, 294 U.S. 207, 209 (1935).

It is submitted that the proper application of the doctrine of fair use requires the Court to make a reasonable estimate of *potential* economic injury. It is entirely unprecedented to conclude that such potential does not exist where a defendant has reproduced intellectual property and distributed it to the same class of persons who might otherwise be served by the copyright owner.

The Court also considered that its "solid doubt" as to the meaning of the right to copy was a factor favoring its determination that respondent's activities comprise fair use. Either the right to copy is protected by the Copyright Act or it is not. If copying is not a protected right then the question of fair use is never reached since that doctrine only excuses what would otherwise be infringements of the proprietor's legal rights. Thus the Court's reasoning is simply a *post hoc* argument; its effect is to accord lesser

consideration to the economic interests of the owners of intellectual property than it accords to the manufacturers of reprographic hardware.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respecfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1279

THE WILLIAMS & WILKINS CO.,
Petitioner

v.

THE UNITED STATES, *Respondent*

BRIEF OF THE SOCIETY FOR INDUSTRIAL AND APPLIED MATHEMATICS, AMICUS CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

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BRIEF OF THE SOCIETY FOR INDUSTRIAL AND APPLIED MATHEMATICS, AMICUS CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Society for Industrial and Applied Mathematics respectfully submits that subject matter of the above entitled matter is of sufficient importance to publishers of learned journals and to the scientific community that it warrants review by the Supreme Court of the United States. The Society therefore supports the Petition of The Williams & Wilkins Co. for a Writ of Certiorari to the U. S. Court of Claims in this proceeding. This *amicus* brief in support thereof is filed with the consent of the parties.

THE INTEREST OF THE AMICUS

The Society for Industrial and Applied Mathematics (SIAM) is a non-profit corporation with 3600 members. It publishes seven journals of articles on mathematical developments of interest to its members and to others in the scientific community. Circulation extends throughout the world; in aggregate there are over 10,000 subscriptions.

The Society is independent of any outside control, and the contents of its publications are subject only to the judgment of peers in the several disciplines of applied and industrial mathematics.

SIAM submits that the questions presented in this case are of sufficient importance to the scientific community in general and SIAM in particular to warrant review and decision by the Supreme Court of the United States. The Society, therefore, supports the Petition for the grant of a Writ of Certiorari.

SIAM has not taken, and does not here take, a position on the merits of this case. Its Trustees are, however, of the opinion that the doctrine of "fair use" requires review, in light of recent and foreseeable technological developments that have and will substantially alter the circumstances under which the doctine was originally applied, since the extent of allowable "fair use" is important to its operations. Once this Court has spoken on the subject, SIAM will have a basis on which to plan its publishing activities, or to develop other means of acquiring and disseminating, from and to its members and other interested parties, the results of research and development in mathematics.

ARGUMENT

To preserve its independence and to insure the continuance of its activities, including the distribution of its publications, SIAM must carefully plan its operations so that its membership dues and subscription fees provide adequate support, but are low enough to encourge membership and subscriptions. Anything which changes the assumptions on which the Society's funding and allocation of resources are based can affect the amount of dues required, the subscription prices, or even the viability or existence of one or more of SIAM's journals and the existence of these media for publication of the results of research and the reciprocal availability of these results to others. The doctine of "fair use" and the recent significant changes in the technology of copying both impact on the management assumptions of the Society. Any definition or application of "fair use" should take account of the current state of relevant technology, otherwise the Society will lack a rational basis for its operation.

Methods of copying, especially Xerography, have developed to the point where the ability to have a machine make, in seconds and for a pittance, one or many copies of almost any printed work is within the reach of almost anyone who wishes to avoid the labor of a physical transcription. The physical effort that was once a necessary part of copying has largely disappeared, and with it has gone one of the implicit limits on "fair use." The subject matter to which the present rule is directed has so changed that the rule itself should be re-examined.

The existing statements of the rule, and decisions thereunder such as that of the Court of Claims in this case, do not take into account these technological changes; and therefore do not give the necessary guidance to organizations, like SIAM, in planning and carrying out the provision of media for the presentation and acquisition of the results of scientific research and development. The practical operation of SIAM requires a delicate balance

among such factors as the supply of technical and scientific papers, the availability of media, the needs of the scientific community for information, the type of media available, and the costs and revenue incidental thereto. To achieve this balance, SIAM should have guidelines, either judicial or legislative, that reflect the realities of technology and enable it to predict the consequences of alternative policies.

In the instant case, the Court of Claims, at pp. 18-19 of its opinion, aptly states the question generated by the recent revolution in reproduction technology to be "whether the marked increase in volume changes a use which was generally accepted as 'fair' into one which has now become 'unfair'." It is the answer to this (and similar questions) that are important to organizations such as SIAM.

The Court of Claims did *not* directly answer this question. Instead, it held that in this particular case, on this set of facts, the Respondent's use was "fair." It based its decision on the traditional factors that until now were taken to underlie "fair use," but without reference to the new technological circumstances in which the doctrine was being applied. The Court considered the possible harm to Petitioner of the Respondent's practices and the possible injury to medical research by inhibiting the practices complained of. On balance, the opinion of the Court below was a "holding action" pending a legislative determination of the relative weights to be given the interests of authors and of users.

The Court of Claims did not re-examine the doctrine of "fair use" in the light of recent technological developments. It did not attempt to modify or in anyway accommodate the rule to the practical impact of photo-copying on the publication of learned journals, but considered only the importance of the use (assuming the continued availability) of these journals to the individual researcher, and limited its analysis to the medical field.

The court below stated, at p. 125 of its opinion, "Intermediate or compromise solutions are not within our authority." But is this really so?

— the doctrine of "fair use" was, itself, a compromise solution to problems raised by a literal construction of the statute, and reflected the way researchers utilized scientific articles.

— for the doctrine of "fair use" to remain constant, it must continue to reflect the realities of the world in which it is used. It could and should change from time to time, as technology changes, to provide a uniform policy of accommodation between conflicting rights.

The time for re-examination of the doctrine of "fair use" is ripe. The question of the impact of new technology on this rule of law is clearly presented by the facts. The relevant near- and intermediate-term technological developments are generally known and understood. Their impact on copying and, in turn, on the publication and use of learned journals in *all* fields of science should be considered. Except to the extent that the Supreme Court feels that the question is solely for the legislature, it can review the rule, and recast it, if necessary, to preserve or to modify the prior relationship among publisher, authors and users.

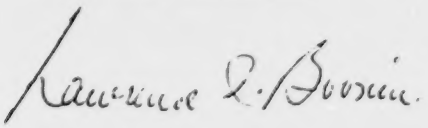
CONCLUSION

This case presents the opportunity for a definitive statement by the Supreme Court of the impact, if any, of changes in the technology of copying on the doctrine of "fair use." This is necessary so that learned societies such as SIAM, to whom the extent of "fair use" of their journals is important, can proceed with or change their methods of serving their respective scholarly communities.

The Society for Industrial and Applied Mathematics therefore supports Petitioner in urging the review of this case by the Supreme Court to clarify or define, for all concerned, the interrelated doctrines of infringement and "fair use" in the context of a changed and changing world.

DATED: Philadelphia, Pennsylvania
March 6, 1974

Respectfully submitted,



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SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,
Petitioner,

v.

THE UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Claims

BRIEF OF THE MAGAZINE PUBLISHERS ASSOCIATION, INC. AS *AMICUS CURIAE*

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TABLE OF CONTENTS

	PAGE
Interest of The Magazine Publishers Association, Inc.	1
Preliminary Statement	2
Summary of Argument	3
Point I—The meaning and effect of this case reach far beyond the particular rights and duties of the specific parties	4
Point II—The unauthorized copying of copyrighted periodicals constitutes infringement	5
Point III—The Court below erred in concluding that petitioner's entire copyrighted works could be machine copied with impunity under respondent's fair use defense	6
Point IV—The Court below erred by overstressing the need of proof of serious economic detriment to the petitioner-copyrightee in measuring "fair use"	8
Conclusion	8

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PAGE

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BRIEF OF THE MAGAZINE PUBLISHERS ASSOCIATION, INC. AS *AMICUS CURIAE*

Interest of The Magazine Publishers Association, Inc.

The Magazine Publishers Association is a national trade association founded in 1919 as a New York membership corporation. Its present membership is composed of more than 125 periodical publishers whose more than 450 publications appear in varying degrees of periodicity, such as on a monthly, bi-monthly, weekly or bi-weekly basis. Such

publications are, in virtually all instances, statutorily copyrighted, and are distributed in the main nationally throughout the United States. In the aggregate the publications of this Association's members have a circulation of approximately 200,000,000 copies per issue. It has been estimated that the combined readership of these publications exceeds 89% of the literate adults in the United States.

The Magazine Publishers Association has, among its active and important committees, its Legal Affairs Committee, which was formerly for many years known as The Copyright Committee, whose area of concern and interest includes copyright matters of particular importance to publishers of magazines and other periodical publications; this Committee advises the Association on such matters. The Association has joined in amici briefs in this Court.

The Association files this amicus brief (with the written consent of both petitioner and respondent herein) because the decision below in the Court of Claims raises issues of singular significance to copyright proprietors of periodicals, including magazines.

Preliminary Statement

The case below, reported in 487 F.2d 1345, was decided by a closely divided court. The petitioner, as the successful plaintiff at the trial level claimed that its statutory copyrights to certain of its medical journals had been infringed by the respondent's unauthorized machine copying of entire articles contained within those journals, for which alleged misconduct petitioner sought reasonable compensa-

tion from the Government under the applicable jurisdictional statute. As indicated above, albeit petitioner's position had been vindicated by the finding of copyright infringement by the Trial Judge, such imposition of liability was thereafter reversed by the Court of Claims itself.

The holding of the Court of Claims appears on page 1453 of the majority opinion, and is to the effect that the extensive photocopying of entire, discrete articles included in petitioner's copyrighted medical periodicals by respondent's National Institutes of Health and National Library of Medicine and the not-for-profit dissemination of such photoduplicates by those governmental agencies to and among presumed scientific researchers and libraries constituted only "fair use", i.e. non-infringing use, of petitioner's copyrighted, composite works.

Summary of Argument

1. The Court's decision below, especially its rationale,

(a) has an importance transcending the interests of the particular litigants,

(b) misreads the law on what constitutes a copyright infringement by "copying" insofar as periodicals are concerned, and

(c) misreads the law on what constitutes "fair use" as a copyright infringement defense.

2. The error of the holding and especially of the ratio decidendi of the Court of Claims herein should be corrected and the confusion and uncertainty engendered thereby should be removed by this Court's hearing of this case on the merits.

POINT I

The meaning and effect of this case reach far beyond the particular rights and duties of the specific parties.

While we believe that the holding below is erroneous, even when it is strictly confined to the factual context of the instant case (and the opinion of Davis, J. speaking for the Court below seems at pains to state that such holding should be so confined), what, we submit, is more importantly troublesome is the unsound and confusion-begetting rationale of such holding.

The far-reaching importance of the basic issue of this case even on its particular facts is found in the dissent below where Chief Judge Cowen stated at page 1364:

> "* * * What we have before us is a case of wholesale, machine copying, and distribution of copyrighted material by libraries on a scale so vast that it dwarfs the output of many small publishing companies."

That the mistaken and unprecedented decision of the Court of Claims herein will have an adverse impact extending far beyond the particular facts of this case and the parties hereto is presciently indicated by Nichols, J. in his dissent where he said at page 1387:

> "* * * However, hedged, the decision will be read, that a copyright holder has no rights a library is bound to respect."

The majority below, also, recognized the overriding significance of the instant case. This it did both overtly and covertly, so to speak. At the outset of its opinion, the

majority stated that it was confronting "a ground-breaking infringement action" (1346). Furthermore, it characterized its decision as a "holding operation" pending remedial legislation (1363). The concealed recognition of this case's importance is evidenced by the Court's critical disregard of controlling precedent to such an extent that its decision may rightly be termed—as the dissent so termed it —an example of "judicial legislation" (1371).

POINT II

The unauthorized copying of copyrighted periodicals constitutes infringement.

The Court below entertained what it called "solid doubt" that periodicals as such come under the panoply of copyright protection insofar as copying per se is concerned. While this may very well have been a "solid doubt" for the Court below it is, we submit, a gratuitous doubt. The plain and unmistakable wording of the Copyright Code (17 U.S.C.) quite clearly provides in Section 1 thereof that all copyrighted works, and of course periodicals and composites are among such works (17 U.S.C. Section 3), are entitled to exclusivity not only as to the printing, reprinting and publishing of such works but also as to the copying thereof. As the dissent herein rightly observed there seems to be no legitimate reason for harking back to inapplicable legislative history regarding prior copyright acts. At bar, the meaning of the words used in said Section 1 should be derived from "* * * the words themselves * * *" and "* * * their setting in a text * * *" (FRANKFURTER, SOME REFLECTIONS ON THE READING OF STATUTES 15.—1947) so that here a court may quite properly "hug the shores of the statute itself" in construing said Section 1.

That the aforementioned "solid doubt" can have a seriously adverse effect on all periodicals, quite apart from those particular ones involved at bar, seems manifest because, if such doubt is to hover over this genre the copyrighted material, then publishers of copyrighted periodicals will never know with the certainty what the law provides, that is, whether the mere copying of their works will entitle them to the same measure of protection as the law accords to other copyrighted works. In short, we submit, there seems to be no basis in reason or judicial authority for the exclusion of copyrighted periodicals from the reach of Section 1 of the Copyright Code to the degree that they may be unauthorizedly copied without redress.

POINT III

The Court below erred in concluding that petitioner's entire copyrighted works could be machine copied with impunity under respondent's fair use defense.

In the Court's opinion there appears at page 1353 a singularly strange statement, couched in the form of a suggestion, to the effect that the copying of "an entire copyrighted work, any such work, cannot ever be 'fair use'." When such suggestion is read, certainly in the factual matrix of this case, one's olfactory sense gets the scent of straw. The Court dismissed the suggestion as "an overbroad generalization, unsupported by the decisions and rejected by years of accepted practice" (1353). We submit that such dismissal is simplistic and at variance with the authorities that have considered the matter. Yet the Court's dismissal of wholesale copying, i.e., the complete

copying of a copyrighted work, under the guise of "fair use," really approaches the crux of this case. Of course, at bar we have the copying of several articles in their respective entireties. But then each of petitioner's journals, whence the articles came, were copyrighted and under Section 3 of Copyright Code the copyright to the whole work carries with it the copyright to each copyrightable, component or constituent part thereof. This is no more than an example of the greater including the less. The general copyright to an entire composite is spread so as to cover the disparate articles within it. (See A. H. Wasserstrom, The Copyrighting of Contributions to Composite Works, 31 Notre Dame Lawyer 381, 403 et seq.—1956). In short, each of the separate articles comprising the petitioner's medical journals constituted a distinct copyrighted work, even without a specific notice of copyright imprinted thereon. When such articles were unauthorizedly photocopied petitioner's copyrights thereto were, we submit, infringed, and the bounds of "fair use" were overpassed. This conclusion, we urge, follows from the very nature of the "fair use" doctrine, one of whose essential elements is the "materiality" or "substantiality" of the borrowed or used "part" or "portion" of the copyrighted work. Such qualitative evaluation, under the rubric of "materiality" or "substantiality," would not perforce be necessary, we submit, were an entire work so borrowed or used, as occurred at bar. We think it clearly follows, both in reason and authority that, when the whole of each article in question was photocopied, the copyright to the medical periodical encompassing it was infringed.

POINT IV

The Court below erred by overstressing the need of proof of serious economic detriment to the petitioner-copyrightee in measuring "fair use."

The fair use doctrine is made up of a plurality of considerations or criteria, only one of which is the adverse economic impact of the use on the potential market for the copyrighted work. Put another way, the copyrightee need not show actual damage, but rather only that the demand for his work will be materially diminished by the use of the accused copy (*Hill* v. *Whalen & Martell*, 220 Fed. 359).

Conclusion

The petition for the writ of certiorari herein should be granted so as to correct the substantial errors below and to obviate the confusion and uncertainty affecting important phases of copyright law arising from such errors.

Respectfully submitted,

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THE UNITED STATES,
Defendant-Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF AMICUS CURIAE BY THE INFORMATION INDUSTRY ASSOCIATION

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Amicus Curiae

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TABLE OF CONTENTS

Page

I. Nature and interest of the Amicus Curiae 1

II. Ruling of the Court below 2

III. The issues 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,

Plaintiff-Petitioner,

v.

THE UNITED STATES,

Defendant-Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF AMICUS CURIAE BY THE INFORMATION INDUSTRY ASSOCIATION

This brief is submitted by the Information Industry Association with Petitioner's and Respondent's consent.

I.

NATURE AND INTEREST OF THE AMICUS CURIAE

The Information Industry Association (the "Association") is a membership association with approximately 65 members. These run the gamut from large and

small information companies to large and small manufacturers of technical equipment including computers and photocopiers. The members of the Association disseminate information accounting for billions of dollars' worth of sales a year. A great part consists of information material which has been selected, collated, editorialized and published at substantial expense and at great investment. The decision below could impair in large measure the assets and businesses of members of this Association.

II.

THE RULING OF THE COURT BELOW

The ruling of the Court below has applied a principle of fair use, applicable to laborious hand copying, to the modern technology which permits rapid, massive and multiple copying by machine. In effect, the ruling of the Court below permits the copying in massive quantities by modern technology without payment of a royalty. It is respectfully submitted that such permission cannot help but endanger the revenue base which is an absolute necessity so that the production and dissemination of highly selective information can be economically sustained. It further will disrupt and be destructive of the economic relationships on which this nation's distinctive competitive marketplace of ideas depends.

III.

THE ISSUES

The interest of this amicus in the resolution of this case is twofold. Not only are its members concerned with the precedent of this case in the light of the narrow factual ground presented, but the information industry is concerned with the effect of this case as a precedent with a broad sweeping principle.

This amicus submits that the Supreme Court should grant certiorari so that there may be some resolution of the issues which have arisen in recent years by reason of the rapid increase in technology in conjunction with the explosion in information and communications. Machine photocopying is obviously one means of facilitating the use of such information and communication.

An issue before this Court is whether rapid, massive machine photocopying is the equivalent of the former laborious hand copying with its own limitations as to time, effort and expense.

Another issue is the applicability of fair use to the wide dissemination of material, as opposed to hand copying for the single use of the person involved.

A still further issue is whether the dissemination of information by centers created for collection and storing of published material, as a vehicle for rapid, massive photocopying and distribution of such materials, constitutes fair use.

In connection with the above, this amicus suggests that if the National Library of Medicine had obtained a printing press in order to comply with the requests for copies, there would have been no question but that the multiple copying and dissemination of copyrighted materials would have constituted a violation of the copyright. A further issue is whether the use of a photocopy machine instead of a printing press makes a difference in the application of fair use.

In sum, this Association respectfully submits that the possible use of the lower Court's opinion as a dangerous precedent of broad scope presents an issue of great importance not only to the information industry, but to our society as well dependent as it is on the continued viability of the open and competitive marketplace of ideas, and should therefore be reviewed by the Court.

Accordingly, we respectfully urge that the petition for certiorari be granted.

Respectfully submitted,

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OCTOBER TERM, 1973

WILLIAMS & WILKINS CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

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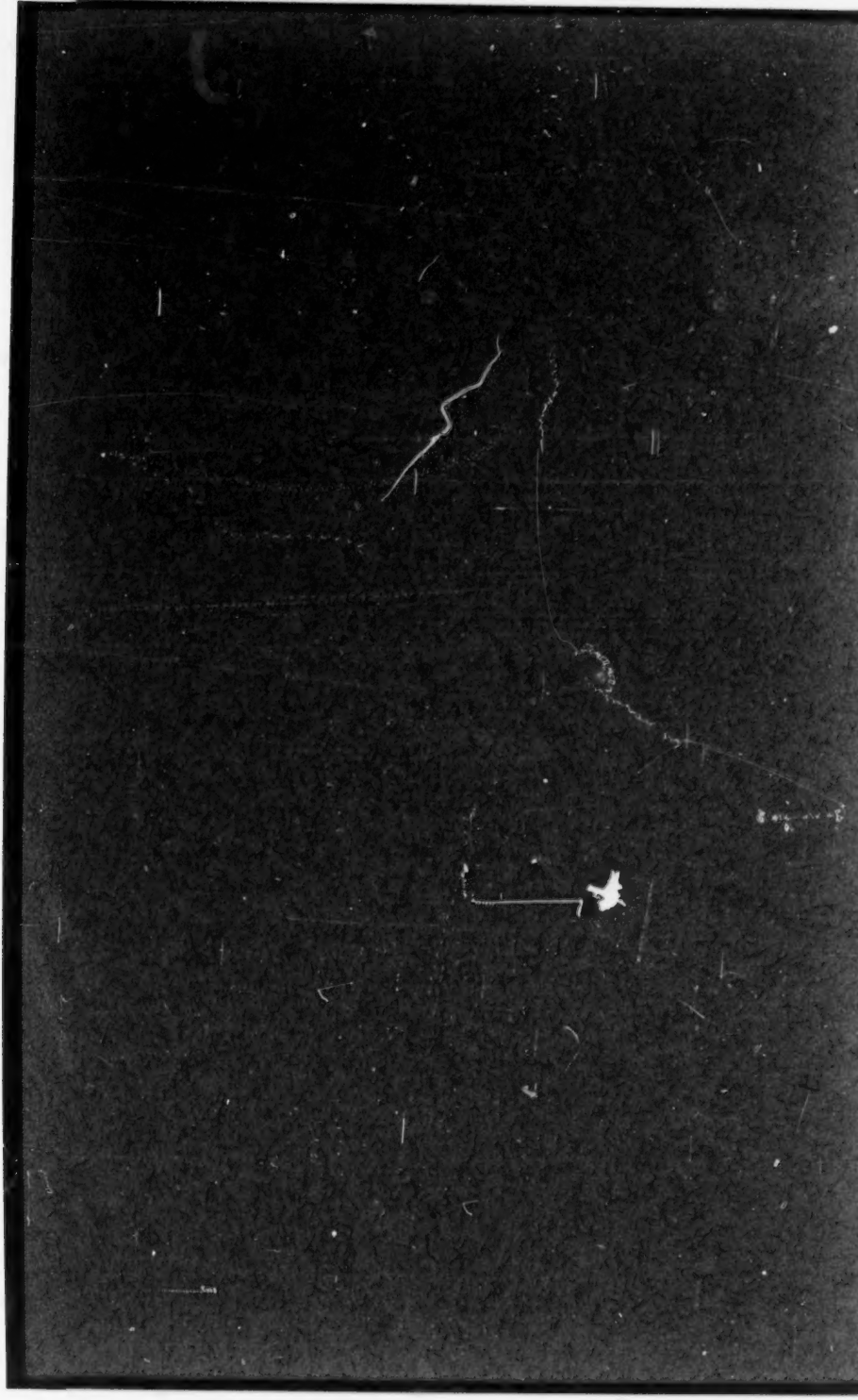

In the Supreme Court of the United States

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OPINION BELOW

The opinion of the United States Court of Claims (Pet. App.) is reported at 487 F. 2d 1345.

JURISDICTION

The judgment of the Court of Claims was entered on November 27, 1973. The petition for a writ of certiorari was filed on February 20, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether defendant's libraries, in furnishing single photocopies of journal articles to their patrons, made a fair use of petitioner's copyrighted journals, and thus did not infringe petitioner's copyrights.

STATEMENT

This suit was brought in the Court of Claims to recover compensation for the alleged infringement of petitioner's copyrights under 28 U.S.C. 1498(b). Petitioner claimed that respondent's libraries at the National Institutes of Health ("NIH") and the National Library of Medicine ("NLM") infringed certain copyrights allegedly owned by petitioner by furnishing to their patrons photocopies of articles appearing in journals published by petitioner. Respondent contended that in making such photocopies the libraries were merely making a permissible or fair use of petitioner's copyrighted journals and, thus, had not infringed petitioner's copyrights. The Court of Claims accepted respondent's contention and dismissed petitioner's complaint (Pet. App. 28, 29).

NIH is the principal federal medical research organization, employing over 12,000 persons of whom 4,000 have professional degrees. To support its medical research programs, NIH maintains a staff library, containing approximately 150,000 volumes of which about 30,000 are books and the balance journals. The library furnishes to NIH employees photocopies of

journal articles pertinent to their research work (Pet. App. 3, 4).

NLM was constituted in its present form by an Act of Congress in 1956. In this statute, Congress declared the purpose of NLM was "* * * to aid the dissemination and exchange of scientific and other information important to the progress of medicine and to the public health * * *" and to make available such information "* * * through loans, photographic or other copying procedures * * *." 42 U.S.C. 275, 276(4). NLM is a "library's library," and furnishes to other libraries, under the interlibrary loan program, photocopies of medical journal articles (Pet. App. 5).

Both the NIH library and NLM have adopted and enforced guidelines to limit their photocopy services. Both require a written request. Both will furnish only a single copy of a journal article per request, and both limit each request to 40 or 50 pages. (Exceptions to the page limit are sometimes made in the case of long articles.) Both have rules designed to avoid excessive copying from a single journal issue. In addition, NLM will not fill requests for articles from the 104 journals included in their "widely available list" [1] (Pet. App. 5, 6, 15).

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[1] A rejection on this basis is not made in the case of requests from government libraries, or in the case of a request for an article published more than 5 years before the request. The four journals identified in petitioner's complaint are named on the widely available list (Pet. App. 6).

The Court of Claims concluded that the library photocopying in this case was a fair use of the copyrighted material.[2] It rested this conclusion on the presence in this case of eight elements.[3] It noted that "probably the core of our evaluation" consisted of three propositions: 1) that plaintiff had not shown it was substantially harmed by the NIH and NLM practices;[4] 2) that the court was convinced medicine and medical research would be harmed by a finding that these practices constituted infringement; and 3) that, absent legislative guidance, the court should

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[2] "The judicial doctrine of fair use [is] one of the most important and well-established limitations on the exclusive rights of copyright owners * * *. Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts." H. Rep. No. 83, 90th Cong., 1st Sess., 29.

[3] "We do not have to, and do not, say that any particular component would be enough, either by itself or together with some of the others. Conversely, we do not have to, and do not, say that all the elements we mention are essential to a finding of 'fair use'. They all happen to be present here, and it is enough for this case to rule, as we do, that at least when all co-exist in combination a 'fair use' is made out" (Pet. App. 28).

[4] The court refused to assume that this photocopying had an adverse impact on petitioner's market for its copyrighted work, since it was likely that the user of the photocopy would, if the copy were not available, simply do without the information, rather than purchase the journal (Pet. App. 20-22).

not impose such a risk of harm on these fields (Pet. App. 14, 19-25).[5]

ARGUMENT

The decision of the Court of Claims is correct. This case is the first one to deal specifically with the question of the copyright consequences of library photocopying; it is, therefore, of substantial interest to libraries, researchers, and publishers.[6] Nevertheless, since the decision is limited to the holding that

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[5] The other elements identified by the court as indicating that the photocopying here challenged constituted a fair use of the materials were: 1) The total absence of any element of commercial gain to be derived from the reproduction, since these libraries are non-profit institutions, and the major users of the service are scientific researchers and practitioners who need the scientific materials involved for their work, and will not reduplicate them for sale or general distribution (Pet. App. 14-15); 2) Both libraries have reasonably strict limitations on the photocopying services provided, which effectively minimize potential harm to the copyright owner (Pet. App. 15-17); 3) The practice of library photocopying has long been accepted as appropriate (Pet. App. 17-19); 4) There is grave uncertainty that the prohibition on copying in the current copyright law extends to this practice, and the House Report on the proposed revision of that law indicates that library photocopying is a fair use in appropriate circumstances (Pet. App. 8-11, 23-27); and 5) The practice in foreign counties indicates that the library photocopying here is a fair use (Pet. App. 27-28).

[6] A holding that the photocopying involved here infringed petitioner's copyrights would substantially benefit petitioners and *amici* financially, since it would permit them to negotiate licensing agreements with NIH and NLM, and place them in a stronger position to negotiate such agreements with other libraries.

the photocopying by these libraries of these journals is a fair use of the copyrighted materials here involved, and disclaims any conclusions concerning the practice of photocopying in any other situations, the decision is in fact a narrow one, not meriting review by this Court.[7]

One of the reasons the court was careful to limit its holding to the precise facts of this case was its recognition of the inappropriateness of any attempt to establish judicially the broad principles which should govern the application of new technologies to copyright law, a matter "preeminently a problem for Congress * * * [since] [t]he choices involve economic, social, and policy factors which are far better sifted by a legislature" (Pet. App. 25). This Court has reached the same conclusion in *Teleprompter Corp.* v. *Columbia Broadcasting System*, No. 72-1628, decided March 4, 1974, slip op. p. 19: "shifts in current business and commercial relationships * * * simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago * * *. Detailed regulation of these relationships, and any ultimate resolution of the many

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[7] Moreover, the very fact that this is the first case to consider the propriety of any library photocopying, despite the fact that photocopying of library materials in this manner has been a common practice at least since 1935 (Pet. App. 17), indicates that the issue is not as significant to those concerned as petitioners and *amici* assert.

sensitive and important problems in this field, must be left to Congress [footnote omitted]." [8]

The Court of Claims properly concluded, for the reasons summarized *supra* at pp. 4-5, that the photocopying by NIH and NLM at issue here constitutes a fair use of the copyrighted materials, rather than an infringement of the copyright. Petitioner's attack on this holding rests primarily on two grounds: 1) the allegation that copying an entire article can never be fair use, and 2) the claim that the court below improperly refused to consider petitioner's willingness to license photocopying by NIH and NLM in determining whether they were infringing petitioner's copyrights. Neither point is well taken.

As the court noted, the suggestion that the copying of an entire copyrighted work cannot be a fair use is "an overbroad generalization, unsupported by the decisions, and rejected by years of accepted practice" (Pet. App. 13). See *New York Tribune, Inc.* v. *Otis & Co.*, 39 F. Supp. 67 (S.D.N.Y.); *Meeropol* v. *Nizer*, 361 F. Supp. 1063 (S.D.N.Y.).

The cases petitioner cites do not conflict with this conclusion, since they do not base their rejection of the defense of fair use on the fact that the entire work was copied. Indeed, in *Benny* v. *Loew's Inc.*, 239 F. 2d 532 (C.A. 9), affirmed by an equally divided court, *sub nom. Columbia Broadcasting System, Inc.* v. *Loew's Inc.*, 356 U.S. 43, the court re-

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[8] The court below noted that revision of the copyright laws is under consideration in Congress (Pet. App. 26). See also *Teleprompter, supra*, slip op. at 19 n. 16.

peatedly noted that "a substantial part" of the copyrighted play was appropriated.[9]

Petitioner argues that the court below erred "by completely ignoring petitioner's licensing program" (Pet. 18), and that, because petitioner is willing to license photocopying by these libraries, no harm to medical research can be anticipated from a holding that they have infringed petitioner's copyrights. But

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[9] The issue in *Benny* was whether a parody of a work infringed the copyright. Petitioner interprets *Public Affairs Associates, Inc.* v. *Rickover*, 284 F. 2d 262 (C.A. D.C.), judgment vacated, 369 U.S. 111, as indicating that there is no possibility of a defense of fair use when verbatim copies of speeches are taken (Pet. 16). But the court there stated only that the theory of fair use would not justify the publication of a work consisting in substantial part of quotations from a copyrighted work (*id.* at 272). In vacating the judgment for an inadequate record, this Court noted that "as to [*Rickover's*] copyrighted speeches, [the court of appeals] remanded the case to the District Court for determination of the extent to which 'fair use' was open to the plaintiff," 369 U.S. at 112.

Wihtol v. *Crow*, 309 F. 2d 777 (C.A. 8), the other case petitioner asserts conflicts with the holding below, held simply that "the copying of all, or substantially all, of a copyrighted song can [~~not~~] be held to be a 'fair use' merely because the infringer had no intent to infringe [citations omitted]," *id.* at 780. Instead, the court held, the proper test is whether the taking sensibly diminishes the value of the original or appropriates the author's labors. Judged by that test, the library photocopying here was a fair use.

In any event, there was no proper basis for a defense of fair use in any of these cases. *Benny* and *Rickover* involved attempts to exploit substantial portions of another's copyrighted work commercially, while *Wihtol* dealt with an unauthorized arrangement of a copyrighted musical work.

the court did not ignore petitioner's program (Pet. App. 24-25). Instead, it correctly concluded that the determination whether a given use is fair, and thus not subject to royalty payments, cannot turn on whether the copyright holder is willing to license it at reasonable rates.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1974.

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Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,

Petitioner,

—against—

THE UNITED STATES,

Respondent.

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

This is in reply to the Brief for the United States filed April 30, 1974 in opposition to the Petition for Certiorari.

1. The Government admits, as it must, that this is a case "of substantial interest to libraries, researchers and publishers" (Brief in Opposition, p. 5). However, its notion that the decision below is nevertheless "a narrow one" (Brief in Opposition, p. 6) is mistaken. The Government libraries here provide thou-

sands of copies of complete articles to thousands of users on a systematic basis. The grounds of the majority opinion dealing with these operations make it clear to libraries throughout the country that there are no effective limits on photocopying.

The broad import already accorded the decision in this case thus far is dramatically illustrated by a development subsequent to the filing of this Petition for Certiorari. On March 24, 1974, *The New York Times* in a comprehensive article (p. 59) reported that a consortium of libraries—presently Harvard, Yale, Columbia and the New York Public Library, but to be expanded as soon as possible to include other libraries—had embarked on "a sweeping and controversial program of combined operations that will entail cutting back purchases of many publications and systematically exchanging photocopies of previously published writings." Although "(t)he early stages of this project are expected to cost $10 million to $15 million," library officials state that there is no plan for the libraries to pay royalties. "They cite a recent United States Court of Claims decision in a case known as Williams & Wilkins, as supporting their position."

Although it is traditional for an opponent of certiorari to argue the narrowness of a decision, the facts simply do not support such an assertion here.

2. The Government attempts to minimize this case of first impression involving photocopying with the argument that such copying has been common practice at least since 1935 (Brief in Opposition, p. 6). This argument must fall in the face of the record, the Government's concession in its brief below (p. 46) that as late as 1958 "there was virtually no photocopying as presently practiced," and the recognition by the majority below that "the proliferation of inexpensive and improved copying machines, less than two decades ago, led to the surge of such duplication" (App. 18).

3. The possible role of Congress in no way diminishes the importance of this case. Indeed, the lack of success thus far in

updating the Copyright Law has been noted in detail by this Court since the filing of this petition. See *Teleprompter Corp.* v. *Columbia Broadcasting System*, Nos. 72-1628, 72-1633, decided March 4, 1974, 181 USPQ 65, at 72, n. 16. It may be noted that the detailed regulation of copyright-broadcasting relationships left to Congress in *Teleprompter* is to be contrasted with the judge-made rule of fair use dominating this case. This doctrine should continue to be given life by the courts and not be legislatively frozen. See H. R. Rep. No. 83, 90th Cong., 1st Sess., 29 (1967); App. 26, n. 28; and Brief in Opposition, p. 4, n. 2.

4. The Government grossly oversimplifies petitioner's attack on the holding of the Court of Claims majority. (There is no recognition anywhere in the Brief of dissent by three judges and the issues they raise.) While petitioner certainly deems pertinent its reasonable licensing proposals (see Petition, p. 7, n. 7 and p. 18), we urge the Court to rely on the petition, rather than the Government's characterizations, for petitioner's statement of why it believes that the Government's massive, systematic million-page copying operations constitute copyright infringement and not fair use.

CONCLUSION

It is respectfully submitted that for all the reasons stated in the petition and herein, a writ of certiorari should be granted.

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SUPREME COURT, U. S

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On Writ of Certiorari to the United States Court of Claims

BRIEF OF AMICUS CURIAE, THE AMERICAN CHEMICAL SOCIETY

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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

INTEREST OF THE AMICUS CURIAE 2

ARGUMENT 7

CONCLUSION 19

APPENDIX A: Letter of Permission from Respondent.. 1a

APPENDIX B: Letter of Permission from Petitioners.. 2a

AUTHORITIES CITED

CASES:

Bonnar v. *United States*, 194 Ct.Cl. 103, 438 F.2d 540 (1971) 11

Davis v. *United States*, 164 Ct.Cl. 612 (1967) 11

Henry Holt & Co., Inc. v. *Liggett & Meyers Tobacco Co.*, 23 F. Supp. 302 (E.D.Pa. 1938) 11

Masson & Cie, et al. v. *Le Centre National de La Recherche Scientifique* (Le Tribunal de Grande Instance de Paris, January 28, 1974) (France)... 12

Mazer v. *Stein*, 347 U.S. 201,219 (1954) 17

Washington Pub. Co. v. *Pearson*, 306 U.S. 30,36 (1939) 16, 17

Williams & Wilkins Co. v. *United States*, 487 F.2d 1345 (Ct.Cl. 1973) .....*passim*

Wilson v. *United States*, 151 Ct.Cl. 271 (1960) 11

STATUTES:

17 U.S.C. § 1(a) 7

17 U.S.C. § 3 7

28 U.S.C. § 1498(b) 7, 8

Page

OTHER:

H. R. 2512, 90th Cong., 2d Sess. (1967) 13

S. 1361, 93d Cong., 2d Sess. (1973)..... 13

S. 1361, 93d Cong., 2d Sess. § 106 (1973) 13

S. 1361, 93d Cong., 2d Sess. § 108 (1973) 14

S. 1361, 93d Cong., 2d Sess. §§ 107-11 (1973)..... 13

S. Rep. No. 93-983, 93d Cong., 2d Sess. (1974)..... 15

Bonn, George S., "Science Technology Periodicals," Library Journal 88(5), 954-8, March 1, 1963..... 19

Charter of The American Chemical Society, P. L. 358, 7th Cong., 1st Sess. (1937) 3

Omnibus Copyright Revision, Comparative Analysis of the Issues, Cambridge Research Institute, American Society for Information Science, August 1973 16

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On Writ of Certiorari to the United States Court of Claims

BRIEF OF AMICUS CURIAE, THE AMERICAN CHEMICAL SOCIETY

PRELIMINARY STATEMENT

The American Chemical Society submits this brief as *amicus curiae,* urging that the November 27, 1973 Order and Decision of the United States Court of Claims be reversed. The letters of counsel for the Petitioner and Respondent stating their consent to the filing of this brief are set forth in Appendices A and B herein.

INTEREST OF THE AMICUS CURIAE

The American Chemical Society is a non-profit, scientific and educational membership corporation founded in 1876 as a New York corporation. The Society is the largest single organization for chemists and chemical engineers in the United States with a current membership of approximately 110,000.

The Society was reincorporated by an Act of Congress in Public Law No. 358, 75th Congress, Chapter 762, 1st Session, H.R. 7709, signed into law by President Franklin D. Roosevelt on August 25, 1937, to become effective from the first day of January, 1938. The Society is exempt from the payment of federal income taxes under Section 501(c)(3) of the Internal Revenue Code of 1954, as amended. The objects of the Society as set forth in Section 2 of its charter are as follows:

> "*That the objects of the incorporation shall be to encourage in the broadest and most liberal manner the advancement of chemistry in all its branches; the promotion of research in chemical science and industry;* the improvement of the qualifications and usefulness of chemists through high standards of professional ethics, education, and attainments; *the increase and diffusion of chemical knowledge; and by its* meetings, professional contacts, *reports, papers,* discussions, *and publications, to promote scientific interests and inquiry,* thereby fostering public welfare and education, aiding the development of our country's industries, and adding to the material prosperity and happiness of our people." (emphasis supplied)

One of the principal objects of the Society is the dissemination of chemical knowledge through its publications program. The budget for the Society for the

year 1974 exceeds $39,000,000, of which more than $32,000,000 is devoted to its publications program.

The Society's publications now include twenty periodicals varying from scholarly journals containing reports of original research in such fields as medicinal chemistry, biochemistry, and agricultural and food chemistry, to a weekly newsmagazine designed to keep chemists and chemical engineers abreast of the latest developments affecting their science and profession. In addition, the Society is the publisher of CHEMICAL ABSTRACTS, the world's most comprehensive scientific abstracting and indexing service. The funds to support these publications are derived chiefly from subscriptions by the Society's members.

The Society's publications and their periodicity of publication, circulation, and the cost to subscribers, as of January 1, 1974, are as follows:

Publication	Periodicity of Publication	Circulation	Rates Members	Rates Non-Members
Chemical Abstracts	Weekly	Company & Individual 3,170 Universities 2,408		$2,900.00 2,400.00
Constituents & Derivatives of Chemical Abstracts	No set schedule	In excess of 12,000		Range from 35.00 to 100.00
Journal of American Chemical Society	Bi-weekly	15,613	$22.00	66.00
Chemical & Engineering News	Weekly	121,562	5.00	9.00
Analytical Chemistry	Monthly	30,898	5.00	7.00
The Journal of Physical Chemistry	Bi-weekly	5,262	20.00	60.00

Publication	Periodicity of Publication	Circulation	Rates	
			Members	Non-Members
Journal of Agricultural and Food Chemistry	Bi-monthly	4,885	10.00	30.00
The Journal of Organic Chemistry	Bi-weekly	9,067	20.00	60.00
Journal of Chemical and Engineering Data	Quarterly	2,144	15.00	45.00
Journal of Chemical Documentation	Quarterly	1,946	7.00	21.00
Biochemistry	Bi-weekly	6,711	20.00	60.00
Inorganic Chemistry	Monthly	5,000	18.00	54.00
Journal of Medicinal Chemistry	Monthly	3,914	15.00	45.00
Chemical Reviews	Bi-monthly	5,581	13.00	39.00
Chemistry	Monthly	32,165	6.00	6.00
I&EC Process Design and Development	Quarterly	6,672	7.00	21.00
I&EC Fundamentals	Quarterly	6,702	7.00	21.00
I&EC Product Research and Development	Quarterly	6,763	7.00	21.00
Environmental Science And Technology	Monthly	26,408	6.00	9.00
Macromolecules	Bi-monthly	2,307	12.00	36.00
Chemical Technology	Monthly	13,537	9.00	18.00
Accounts of Chemical Research	Monthly	11,588	7.00	21.00

Additionally, the Society publishes on a non-periodical basis the following:

Directory of Members

Abstracts of Meeting Papers

Advances in Chemistry Series

Seidell's Solubilities of Inorganic and Organic Compounds

Specifications and Test Methods for Laboratory Reagent Chemicals

Collective Indexes to Chemical Abstracts and Society Journals

Such other books, pamphlets, and reprints as may be authorized by the Board of Directors.

The twenty primary periodical publications of the Society produce more than 43,000 pages a year, and CHEMICAL ABSTRACTS produces more than 127,000 pages a year. Its abstracts number in excess of 380,000 annually and its documents indexed in excess of 410,000.

The journals and other published writings of the Society, in accord with the Society's Federally chartered objectives, serve a most important function—the increase and diffusion of chemical knowledge. Revenues generated by these publications permit the Society to support and continue its publications program in furtherance of its chartered objectives by promoting scientific interest in the field of chemistry. The protection of copyright has been an important factor in the growth and development of the scientific publications program of the Society.

The Society therefore has a deep and abiding interest in the outcome of this case. The promotion of re-

search in chemical science and industry requires the most effective possible dissemination of information. In order to accomplish this objective, the Society, operating as a non-profit organization, seeks to provide the best possible means of collecting chemical knowledge and of disseminating that knowledge to those who need and use it. The Society endeavors to maintain the unit cost of its publications at a level which will encourage their use throughout the scientific community. It should be recognized that the considerable expense of the Society's publications program must be met in full. If libraries are permitted to photocopy the Society's copyrighted scientific articles for use by researchers without paying royalties and/or license fees, users will not subscribe to the Society's publications. The result will be a reduction in paid circulation and a smaller base over which to distribute the expenses of the publications program, driving up unit costs to unacceptable levels. Such appreciable increases in cost would defeat the Society's efforts to maintain the broad and effective distribution of its publications.

The Society therefore urges that the systematic library reproduction of copyrighted scientific articles without permission of or payment to the publisher will have a deleterious effect on the dissemination of chemical knowledge and on efforts to promote scientific research in the field of chemistry.

ARGUMENT

The Williams & Wilkins Company, the petitioner herein, asserts that the systematic reproduction of journal articles by a central research library or library system constitutes a copyright infringement under the

copyright laws of the United States, which provide in pertinent part as follows:

> "§ 1. EXCLUSIVE RIGHTS AS TO COPYRIGHTED WORKS.—Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right;
>
> (a) To print, reprint, publish, copy, and vend the copyrighted work;"
>
> * * *
>
> "§ 3. PROTECTION OF COMPONENT PARTS OF WORK COPYRIGHTED: COMPOSITE WORKS OR PERIODICALS.—The copyright provided by this title shall protect all the copyrightable components of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title." 17 U.S.C. §§ 1(a), 3 (1970).

The petitioner, primarily a medical publisher, has charged that the Department of Health, Education and Welfare, through the National Institutes of Health (NIH) and the National Library of Medicine (NLM) has infringed its copyrights by making repeated unauthorized photocopies of entire articles from its copyrighted journals. The petitioner initiated this action to recover reasonable compensation for copyright infringement under 28 U.S.C. § 1498(b), which consents to infringement suits against the United States and vests exclusive jurisdiction over such suits in the Court

of Claims. The statute provides in pertinent part as follows:

> "Hereafter, whenever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States * * * the exclusive remedy of the owner of such copyright shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation * * * *"

An extensive trial was held before Trial Judge James F. Davis who decided that the Government was liable for infringement. On review the Court of Claims, in a 4-3 decision, rejected the opinion of the Trial Judge and held that the petitioner was not entitled to recover. Your amicus supports the position of the petitioner and urges that the decision of the Court of Claims be reversed and remanded with directions to adopt the Trial Judge's opinion, findings of fact, and recommended conclusions of law as a basis for a judgment in favor of the petitioner.

This action is based upon the reproduction of petitioner's copyrighted articles by means of a comprehensive photocopying system whereby NIH and NLM, relying generally on one or two subscriptions to a journal, regularly fill the requests of library users for journals of the petitioner and other publishers by photocopying the requested journal articles. This photocopying system is an integral part of the NIH and NLM library operations.

The demand by research workers at NIH for access to journals is not met by in-house subscription copies. The NIH library therefore runs a photocopying service which provides copies of journal articles for the

NIH research staff, some twelve thousand in number. On request, a researcher can obtain a photocopy of an article from any of the journals in the library's collection. The library does not monitor the reason for requests or the use to which photocopies are put. The photocopies are not returned to the library and are apparently retained by researchers for whatever use they may desire. The record reveals that in 1970, the NIH library filled 85,744 requests for photocopies of journal articles, consisting of approximately 930,000 pages. (emphasis supplied)

NLM is a "librarians' library," which as part of its operation cooperates with other libraries and like research oriented institutions in an interlibrary loan program. Upon request, NLM will loan to other libraries, Government institutions, schools, hospitals, private physicians and to some extent to drug companies and other private enterprises, books and other materials from its collection. In the case of journals, NLM furnishes photocopies of the desired articles instead of lending the original. These photocopies are supplied by NLM free of charge and on a no-return basis. Users are therefore able to acquire free photocopies of copyrighted articles from NLM. The record discloses that in 1968 about 12,000 requests were filled by photocopying single articles from journals.

The Copyright Act of 1909, which governs this case, provides that the copyright owner has the exclusive right to print, publish and copy the copyrighted work. This right is subject to a judicially created right of "fair use," which depends on an evaluation of varying factors which bear on each case. The application of the doctrine of fair use depends on a case-by-case examina-

tion of the following: (a) the purpose and character of the use, (b) the nature of the copyrighted work, (c) the amount and substantiality of the material used in relation to the copyrighted work as a whole, and (d) the effect of the use on a copyright owner's potential market for and value of his work. *Williams & Wilkins Co.* v. *United States,* 487 F.2d 1345, 1352 (Ct. Cl. 1973).

Taking these factors into account, the majority of the Court of Claims denied the petitioner's request for reasonable compensation for the infringement of its copyright, concluding that "on this record, the challenged use should be designated 'fair' and not 'unfair.' " 487 F.2d at 1353. The Court set forth three propositions upon which it based its decision—first, the petitioner is not being substantially harmed by the photocopying practices in question; second, medicine and medical research will be injured by holding these practices to be an infringement; and, third, until a legislative solution is forthcoming, the Court should not place the risk of harm upon science and medicine. 487 F.2d at 1354. The Court, in an attempt to accommodate the interests of science with those of publishers and authors, sought to protect and promote the progress of science and medicine. Your amicus contends that the Court's decision, if allowed to stand, will have just the opposite effect and will, in fact, retard progress in the sciences.

In reaching its decision, the Court held that the petitioner failed to prove that photocopying would have a serious adverse impact on the potential market for its copyrighted journal articles. The Court concluded that the petitioner (together with "medical publishers generally") has not been substantially harmed by the

photocopying practices in question and that there was no evidence to show specifically that unauthorized photocopying has resulted in the loss of revenue to the petitioner or to publishers generally. 487 F.2d at 1359. However, the Trial Judge found that it was not unreasonable to infer from the evidence that extensive unauthorized copying has resulted in some loss in revenue and that it served to diminish the potential market for the original articles. In his able dissenting opinion, Chief Judge Cowan points out that since the inferences made by the Trial Judge may reasonably be drawn from the facts and circumstances in evidence, they are presumptively as correct as his findings of fact. *See Bonnar* v. *United States,* 194 Ct.Cl. 103, 109, 438 F.2d 540, 542 (1971). Accordingly, under the standards employed by the Court of Claims for reviewing the findings of trial judges, the Court should have adopted those findings. *Davis* v. *United States,* 164 Ct.Cl. 612, 616-17 (1967); *Wilson* v. *United States,* 151 Ct.Cl. 271, 273 (1960).

The very nature of an action for infringement places a heavy burden on the copyright owner to show that unauthorized photocopying results in some loss of revenue or serves to diminish the potential market for the original article. However, it is well established that proof of actual damage is not required and that the defense of "fair use" may be overcome where potential injury is shown. *See, e.g., Henry Holt & Co., Inc.* v. *Liggett & Meyers Tobacco Co.,* 23 F.Supp. 302, 304 (E.D.Pa. 1938). The instant dispute presents an example of unauthorized wholesale machine copying and wide distribution of copyrighted material to users "on a scale so vast that it dwarfs the output of many small

publishing companies." *Williams & Wilkins Co.* v. *United States,* 487 F.2d at 1364 (dissenting opinion of Cowan, C.J.). The photocopying services do not involve the minor sporadic copying of portions of scientific articles, but rather the copying of entire articles for free distribution to whoever requests them. The photocopies are substitutes for and serve the same purpose as the original articles. It follows that the unauthorized copying of a substantial number of copyrighted articles supplants the need for journal subscriptions. The judicially created doctrine of "fair use" should therefore not be extended to cover this type of massive copying and distribution operation.

In holding that the systematic reproduction of journal articles by a central research library is not a copyright infringement under the laws of the United States, the majority relies on the stated practice of some foreign countries in deciding that the unauthorized copying in this case is "fair use." 487 F.2d at 1362. The majority's reliance on foreign legislation is misplaced since these laws are markedly different from and often contrary to U. S. copyright law. Even so, the courts of foreign countries have strictly construed the limited right of a user to make copies of copyrighted materials. For example, in *Masson & Cie, et al.* v. *Le Centre National de La Recherche Scientifique* (Le Tribunal de Grande Instance de Paris, January 28, 1974) (France), the court held that the limited right of copying for private use did not extend to the copying and lending practices of a government operated central research library which engaged in large scale photocopying of copyrighted journal articles without permission of, or payment to the publisher.

Flying in the face of the language of the copyright statute, the Court of Claims has placed itself in the position of usurping the legislative authority of the U. S. Congress by totally ignoring the clear meaning of the statute. While claiming that it lacks authority to fashion intermediate or compromise solutions, the Court expressly recognizes that it is essentially acting as an interim legislative body.

> "The truth is that this is now preeminently a problem for Congress * * * * The choices involve economic, social, and policy factors which are far better sifted by a legislature. The possible intermediate solutions are also of the pragmatic kind legislatures, not courts, can and should fashion." 487 F.2d at 1360.

The Court intended its decision to be a " 'holding operation' in the interim period before Congress enacts a preferred solution." 487 F.2d at 1363. It should be noted, however, that Congress has been wrestling with an omnibus copyright revision for the past eighteen years. The House of Representatives has passed a bill, H.R. 2512, 90th Cong., 2d Sess. (1967), and a bill providing for the general revision of the copyright law was introduced in the Senate on March 26, 1973. S. 1361, 93d Cong., 2d Sess. (1973). The Senate bill gives to copyright owners the exclusive rights of reproduction, adaption, publication, performance, and display. S. 1361, 93d Cong., 2d Sess. § 106 (1973). The copyright owner's exclusive rights as set out in Section 106 and as reported to the Senate by the Judiciary Committee on July 3, 1974, are subject to various limitations, qualifications, or exemptions. S. 1361, 93d Cong., 2d Sess. §§ 107-11 (1973). Consequently, notwithstanding the exclusive rights of copyright owners,

Section 108 provides that under certain conditions it is not an infringement of copyright for a library to reproduce or distribute not more than one copy of a work, provided that the following conditions are satisfied:

(1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage,

(2) the collections of the library are open to the public or available not only to researchers affiliated with the library, but also to other persons doing research in a specialized field, and

(3) the reproduction or distribution of the work includes a notice of copyright.

However, subsection (*g*) provides that Section 108 does not authorize the systematic reproduction or distribution of copies of copyrighted works.

> "(g) *The rights of reproduction and distribution under this section* extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but *do not extend to cases where the library or archives, or its employees:*
>
> (1) *is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group;* or
>
> (2) *engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d).*" (emphasis supplied)

The purpose of this subsection is to prevent the systematic reproduction or distribution of copyrighted material to other libraries or to groups of users under an arrangement whereby the reproducing library serves as the source of such material. Otherwise, this systematic reproduction or distribution of copyrighted material would remove the need for subscriptions or reprints which users might otherwise save purchased for themselves from the publisher. The Committee Report sets out the following examples to illustrate some of the copying prohibited by subsection (g):

> "(1) A library with a collection of journals in biology informs other libraries with similar collections that it will maintain and build its own collection and will make copies of articles from these journals available to them and their patrons on request. Accordingly, the other libraries discontinue or refrain from purchasing subscriptions to these journals and fulfill their patrons' requests for articles by obtaining photocopies from the source library.
>
> (2) A research center employing a number of scientists and technicians subscribes to one or two copies of needed periodicals. By reproducing photocopies of articles the center is able to make the material in these periodicals available to its staff in the same manner which otherwise would have required multiple subscriptions." S. Rep. No. 93-983, 93d Cong., 2d Sess. (1973).

This long-awaited revision of the copyright law would clearly prohibit the library photocopying practices which are the subject of this dispute.

The majority in the Court of Claims justifies its "holding operation" on the grounds that the record fails to show economic detriment to the petitioner but

does demonstrate injury to medical and scientific research if photocopying of this kind is held unlawful.

The petitioner has not undertaken this suit to halt or limit photocopying. It instituted this action in order to recover reasonable compensaion for Government use of its privately copyrighted articles and thereby broaden the financial support for the ever-increasing costs of privately published, scientific journals whose survival is vital to the growth of scientific knowledge.

Unlike the petitioner herein, your amicus is a nonprofit organization whose purposes, as previously set forth, include "the increase and diffusion of chemical knowledge by . . . reports, papers, discussions and publications." Congress has seen fit to encourage such purposes and in furtherance thereof, has extended to the American Chemical Society and like scientific organizations exemption from federal income tax under Section 501(c)(3) of the Internal Revenue Code of 1954. It is with this same keen interest in the advancement of the sciences and learning, that Congress enacted the copyright laws. Protection of an individual's copyright was recognized as essential even prior to the assembling of the Constitutional Convention. At that time, twelve of the thirteen colonies, all but Deleware, already had laws to protect the copyright interests of individuals. The copyright law itself recognizes that protection for an individual's endeavors is the *quid pro quo* for progress in learning and the sciences, and without such encouragement, the growth of our scientific knowledge will be stunted. *Omnibus Copyright Revision, Comparative Analysis of the Issues,* Cambridge Research Institute, American Society for Information Science, August 1973. In *Washington Pub. Co.*

v. *Pearson,* 306 U.S. 30, 36 (1954), the Court recognized that these copyrights were "to afford greater encouragement to the production of literary works of lasting benefit to the world." In *Mazer* v. *Stein,* 347 U.S. 218, 220 (1939), the Court stated:

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of the individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'science and useful arts.' "

The goals of the American Chemical Society, like the goals of the copyright law, are to encourage progress in science. The scientific works of the Society and other like organizations will be adversely affected by the decision of the Court of Claims, if permitted to stand. A review of the previously listed circulation figures of each of the Society's publications shows that only one of the twenty periodicals enjoys a circulation in excess of 32,000. Fourteen of the twenty publications have a circulation of less than 10,000, and eight have a circulation of less than 6,000. Even a few hundred subscribers lost because of the massive infringing practices of the libraries can affect the unit subscription price of a periodical. This problem can best be seen in the case of the Society's CHEMICAL ABSTRACTS service. There are a total of only 5,578 subscribers to this service. The price is $2,900 per year to companies and individuals and $2,400 per year to universities. It takes little mathematical talent to recognize that photocopying of large portions of these periodicals can be accomplished at a fraction of the cost of a subscription.

The American Chemical Society does not seek to restrict the dissemination of scientific information, for

such dissemination is precisely the purpose of the Society. Its complaint is not the loss of profits to the Society, for the Society makes no profits. The appeal of the Society is to allow it to continue to publish its scientific periodicals and be compensated for their dissemination as required by Congress, so that the proceeds therefrom may be reinvested in further dissemination of scientific knowledge.

The American Chemical Society disseminates more scientific information in the field of chemistry than any other organization. Its accomplishments in this area have been recognized both by Congress and by other branches of government. Its investments are great from the standpoint of both manpower and dollars. Your amicus believes that this program is a vital service which must be continued. The Society is deeply concerned, however, that the unauthorized use of materials under an increasingly liberal "fair use" doctrine could impair, or even destroy, its ability to generate, publish, and disseminate such scientific information. While the Society in no way seeks to hamper or restrict either the learning process or the use of technological developments and equipment needed to improve the exchange of information, it cannot be oblivious to the effects of these developemnts on the essential financial support needed to continue its publications program.

It would be difficult or impossible to obtain accurate figures to indicate precisely the volume of current uncontrolled copying in terms of subscription losses. It can be shown, however, that this problem is particularly acute in the area of chemical publications. In a study of the copying of technical journals from the New York Public Library, five American Chemical Society journals appeared on the list of twenty-two most copied

journals, and ranked two, three, five, twelve and thirteen respectively. Bonn, George S., "Science Technology Periodicals," Library Journal, 88(5), 954-8, March 1, 1963.

CONCLUSION

The purposes of the American Chemical Society, like the purposes of the copyright law, are to promote progress in science. The eroding of the protection afforded under the copyright law will result in the retarding of the Society's efforts toward progress in science. The erosion caused by the Court of Claims' decision concerning "fair use" will be so swift that the Society cannot afford to accept that decision as a "holding position" until some undetermined date when the Congress takes appropriate action.

Accordingly, the Society reiterates its support of the petitioner and respectfully urges that the decision of the Court of Claims be reversed and remanded with directions to adopt the Trial Judge's opinion, findings of fact, and recommended conclusions of law as a basis for a judgment in favor of the petitioner.

Respectfully submitted,

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APPENDIX A

LAW OFFICES
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200 East 42nd Street
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July 1, 1974

Arthur B. Hanson, Esq.
Hanson, O'Brien, Birney,
Stickle and Butler
888 Seventeenth Street, N.W.
Washington, D.C. 20006

Re: Williams & Wilkins v. The United States U. S. Supreme Court; Oct. Term, 1973 No. 73-1279

Dear Mr. Hanson:

Pursuant to your request, petitioner, The Williams & Wilkins Company, consents to the filing of a brief *amicus curiae* in the above matter by the American Chemical Society.

Sincerely yours,
/s/ ALAN LATMAN

APPENDIX B

OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530

July 8, 1974

William J. Butler, Jr., Esq.
Hanson, O'Brien, Birney, Stickle
and Butler
888 Seventeenth Street, N.W.
Washington, D.C. 20006

Re: Williams & Wilkins Company v. United States,
No. 73-1279, October Term, 1973

Dear Mr. Butler:

In response to the request in your letter of July 5, I hereby consent to your filing a brief amicus curiae in the above-entitled case on behalf of the American Chemical Society.

Sincerely,

/s/ ROBERT H. BORK
Solicitor General

Submitted With the Consent of the Parties

JUL 25 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS CO.,

Petitioner,

against

THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF AMICI CURIAE OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., THE ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INC., EDUCATIONAL MEDIA PRODUCERS COUNCIL

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TABLE OF CONTENTS

	PAGE
The Interest of the Amici	2
Preliminary Statement	2
Summary of Argument	4
POINT I—Defendant's copying was prima facie infringement	5
POINT II—Defendant's copying was not fair use	7
POINT III—There is no basis for the Court's major premise: that photocopying will be halted and research hindered if defendant's copying practices are found to infringe	13
POINT IV—The majority decision ignores the congressional purpose that wholesale library copying be licensed and not exempted from copy fees	14
POINT V—Foreign law and practice do not justify the majority's decision	16
Conclusion	17

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STATUTES

PAGE

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PAGE

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IN THE

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THE WILLIAMS & WILKINS CO.,

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BRIEF AMICI CURIAE OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., THE ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INC., EDUCATIONAL MEDIA PRODUCERS COUNCIL

This brief is submitted in behalf of Association of American Publishers, Inc. (AAP), The Association of American University Presses, Inc. (AAUP), and Educational Media Producers Council (EMPC) as amici curiae.

AAP is a trade association of book publishers in the United States. Its 260 member companies and subsidiaries are believed to produce 80% or more of the dollar volume of books published in the United States. Some of its members also publish scientific and technical journals. The Williams & Wilkins Company is not an AAP member.

AAUP is a not-for-profit educational membership corporation. Its 66 regular and 7 international members are scholarly publishing divisions of colleges and universities and other educational institutions located primarily in North and South America.

EMPC is an organization within the National Audio-Visual Association. Its 70 members produce approximately 90% of the audio-visual materials used in schools and libraries.

The Interest of the Amici

The interest of the amici is to correct the Court of Claims' conclusions with respect to the photocopying practices of the National Institutes of Health and the National Library of Medicine (NIH and NLM respectively), which by implication affect all publishers. But even more important the court's erroneous construction of basic principles of copyright law would, if carried to its logical extreme, undercut the continued production of intellectual material of every kind—books, journals and audio-visual material, whether produced for profit or on a not-for-profit basis.

Preliminary Statement

What is involved here is large-scale, planned, systematic microfilming and electrostatic reproduction of copyrighted material with sophisticated commercial-type equipment by

- a central library, which by prearrangement meets the needs on demand of satellite libraries in its network (and those of commercial companies as well), and
- a medical institute which, through its central library, supplies its large staff with copies in lieu of the original.

Central libraries and library networks, or systems, whether organized along geographic or specialty lines, exist because of the value of sharing library resources. "Sharing" is a euphemism which in library terms means that by the systematic use of photocopies one published copy of a work can take the place of many.[1]

Library sharing may serve a social purpose. But unless the publisher is otherwise compensated, the "sharing" principle will discourage the publication of the very works which a library may want to acquire and share with others. Publishing requires capital investment, and publishers, whether in the profit or non-profit sector, in order to continue publishing must in the long run produce enough income from sales and licensing to cover the cost of production and distribution and the cost of the required capital.

True library lending in its original form, the actual delivery on loan of the published work itself, does not appreciably limit the anticipated publishing income.[2] Copy-

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[1] "Librarians have long shared resources through such means as union catalogs and interlibrary loans. During recent years, encouraged by Federal and state leadership and funding, they have begun to evolve more formal, contractual 'systems,' 'consortia', 'networks', a few of which, such as MEDLARS, already benefit from computer and telecommunications technology in the provision of regional and local services from national resources. Typical of evolving networks are the intrastate programs in Washington, Ohio, Illinois, New York and California, and the interstate programs in New England, the Southeast and the Southwest. Increasingly, the search for fruitful ways to share the public/private knowledge resource crosses geographical, jurisdictional and type-of-library boundaries." National Commission on Libraries and Information Science, A NATIONAL PROGRAM FOR LIBRARY AND INFORMATION SERVICES: A SYNOPSIS OF THE SECOND DRAFT PROPOSAL, at 4 (June 1974) [hereinafter cited as "SECOND DRAFT PROPOSAL"].

[2] The number of loans is necessarily limited because of the time interval between the borrowing and the return of the loaned books, and loaned copies deteriorate and require replacement.

ing as practiced by NIH and NLM creates an open-end drain on the prospective market, making economically marginal journals unpublishable and many of those otherwise economically sound, marginal.

Summary of Argument

The majority below held that photocopying in the manner done by NIH and NLM was "fair", not "unfair" use and hence was non-infringing.

In so deciding it erred. The fair use doctrine is simply not relevant to the massive copying operations conducted by NIH and NLM which involve not only copying, but printing and reprinting by sophisticated equipment, and publication by wide distribution.

Fair use, by definition, applies only to copying which does not reduce the potential market for the original. NIH and NLM copying makes it unnecessary for others to enter subscriptions for the medical journals to which NIH and NLM subscribe, thus reducing the number of subscribers. NIH would obviously need more than two copies of the plaintiff's journals to serve the employees of its ten institutes were it not for its comprehensive photocopy service. And NLM, a self-styled "librarian's library", advertises to others in effect that they need not purchase the published article from plaintiff because NLM will supply copies free.

NIH and NLM photocopying may be in the public interest (as is the publishing activity of Williams & Wilkins), but the issue here is not whether it should continue or be stopped, but whether the plaintiff should receive reasonable compensation for the copying.

The fear of the majority, underlying its entire opinion, is that if NIH and NLM should be required to pay copying

fees to the plaintiff, copyright owners would be free to enjoin non-government library copying of medical journal articles and thus impede medical research. This is a *non-sequitur*. Injunction is an equitable remedy and in an appropriate case may be refused with the award restricted to damages.

The majority exceeded the limits of judicial authority and assumed a Congressional policy-making role. It chose by a process of "thumb's up or thumb's down" reasoning to exempt defendant's copying practices from payment. It justified its conclusion by saying that it lacked Congressional guidance, but in fact it ignored it.

The decision was wrong for other reasons as well. In drawing a non-existent distinction between the unauthorized printing of a periodical or book and its unauthorized photocopying, the majority misread § 1 of the Copyright Law. By confusing the issue of damage and of liability, it misread § 101 of that Law. It also erroneously assumed that systematic copying such as that done by NIH and NLM is accepted in most other countries as fair use.

The decision should be reversed and the opinion of the trail judge reinstated, but, we suggest, with prospective effect only, so that libraries will not be penalized for past error.

POINT I

Defendant's copying was prima facie infringement.

The majority expressed uncertainty whether the copyright law forbids the "copying" of books and periodicals. It did so because of the distinction it found in the earlier Acts between the proscription against the *copying* of photographs, paintings and drawings and the *printing and publication* of books.

The current Act (17 U.S.C. § 1) draws no such distinction, if any formerly existed, giving the copyright owner the exclusive right:

> "to print, reprint, publish, copy and vend the copyrighted work."

These are repetitive terms[3] conferring the right to *make* copies and to *publish* copies; printing and reprinting being "modes of copying," and vending "a mode of publishing".[4] There is no basis for and the majority was clearly wrong in drawing a distinction between unauthorized printing and the unauthorized photocopying of a book or periodical.

The majority was likewise wrong in concluding that defendant's extensive copying operation did not constitute printing or publishing. To print is "to make an image of;" to publish is "to issue . . . for distribution to the public."[5] NIH and NLM reproduce and make images of copyrighted material for distribution to the public. They copy, they print and they publish.

The majority held the plaintiff had failed to show damage, and therefore had failed to prove infringement. In so holding, it confused the issues of damage and liability.

§ 1, as noted above, gives the copyright owner the exclusive right to make copies of the copyrighted material. One who makes unauthorized copies therefore infringes, subject to the application of the fair use doctrine. Be-

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[3] Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, House Comm. on the Judiciary, 87th Cong., 1st Sess. 21 (Comm. Print July 1961).

[4] Id.

[5] Random House Dictionary of the English Language (unabridged ed. 1966).

cause it is recognized that damage is often difficult to prove, § 101 provides that an infringer shall pay to the copyright proprietor in lieu of actual damage such damage as the court shall deem just. And 28 U.S.C. § 1498(b), under which this suit is brought, provides that whenever copyright is infringed by the United States, the copyright owner shall be entitled to reasonable compensation.

The issue for initial determination is infringement, not damage. Infringement is not dependent on a showing of damage; if infringement is found, damage or compensation follows as a matter of course.[6] Infringement was shown, and as we discuss below, fair use was not.

POINT II

Defendant's copying was not fair use.

Fair use is the dominating theme of the majority's opinion. Its conclusion was that plaintiff had failed to show that defendant's use of plaintiff's material was "unfair;" conversely, it found that it was "fair," and hence not infringing.

In so deciding, the majority appears to have assumed that plaintiff had the burden of showing that defendant's use was unfair. If such was its assumption, it was in error. The burden was on defendant to show that its copying was not infringement because it was protected fair use.[7]

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[6] M. NIMMER, NIMMER ON COPYRIGHT § 145, at 655 (1974) [hereinafter cited as "NIMMER"]; Goldstein, *The Private Consumption of Public Goods: A Comment on Williams & Wilkins* v. *United States*, 21 Bull. of the Copyright Soc'y. of the U.S.A. 204, 205 (1974).

[7] B. RINGER & P. GITLIN, COPYRIGHTS 68-69 (revised ed. 1965).

But the majority's core error lay in its total misunderstanding of the fair use doctrine and the limits within which it may be applied. Fair use is a doctrine of law; it is not an *ad hoc* remedy to be committed to the conscience of judges.[8] It applies only when prescribed standards are met; not as here, because of a conclusion that "on balance . . . thumb's up seems less dangerous to the varying interests at stake during the period which remains before Congress definitely takes hold of the subject."

Fair use developed as an author's right to borrow from or build upon or to criticize earlier works. It was in this context that Mr. Justice Story[9] enumerated the classic tests which have been restated in S.1361, the proposed copyright revision bill;[10] namely, the purpose and character of the work; its nature; the amount used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for or the value of the copyrighted work. All are inter-related but the effect of the copying upon the copyright owner's potential market for the copyrighted work is recognized as of prime importance.

The majority below discusses the scholar's practice to make handwritten notes for his own use. But as Nimmer notes: "the drudgery of making handwritten copies probably means that such copies in most instances are *not* of the complete work [italics supplied], and the quantitative *insignificance* of the selected passages are such as generally not to amount to a *substantial* similarity"[11] (italics in original).

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[8] cf. *Gertz* v. *Robert Welch, Inc.*, 42 U.S.L.W. 5123, 5130 (U.S. June 25, 1974).

[9] *Folsom* v. *Marsh*, 9 Fed. Cas. 342, No. 4901 (D. Mass. 1841).

[10] *S. 1361, 93d Cong., 2d Sess. § 107* (1974).

[11] NIMMER, *supra* note 6, at 656.2.

The library is a new party to the dichotomy. It copies neither for its own authorship nor scholarship. It copies to fulfill the requests of others.[12]

We do not argue that library copying can never be fair use. Some library copying undoubtedly is, but "like everything else, [it] must be judged a fair use or an infringement on the basis of all of the applicable criteria and the facts of the particular case."[13]

There are many different kinds of libraries and of library copying. Copying is sometimes done by local libraries; the kind of copying of a page from a book that was the subject of comment by Senator Burdick during the 1973 hearings before the Senate Subcommittee,[14] or copying to replace a damaged page of a work in the library's collection, or to aid the court in litigation, all of which in our view would be fair use.

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[12] Seemingly aware of the basic difference between copying by a scholar and by a library, the majority, albeit with embarrassment, suggested "that the library is nothing more than the individual requester's ministerial agent." This is a totally meritricious argument as Chief Judge Cowen noted in his dissent: "This argument is so far-fetched that the majority balks at embracing it completely. It collides with reality. The libraries installed and operate the reproduction and distribution operation on their own initiative and without any kind of an agreement with the ultimate users of the copies. There is no showing that these alleged—and in the case of NLM generally unknown—principals have any say in the formulation of the policies and practices of the photocopying operation. The libraries decide, without consulting or obtaining the consent of the alleged principals, whether to loan the original of the journals or to provide photocopies. The libraries are no more the agent of the users of the material than are the venders of plaintiff's magazines and the commercial concerns which are licensed by plaintiff to make and sell copies to doctors and scientists. The essential elements of agency are wholly lacking."

[13] *H.R. Rep. No. 83*, 90th Cong., 1st Sess. 36 (1967) [hereinafter cited as "HOUSE REPORT"].

[14] HEARINGS ON S. 1361 BEFORE THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 93d Cong., 1st Sess. 91-96, 268-69 (1973) [hereinafter cited as "SENATE HEARINGS"].

Libraries in the Interlibrary Loan Program also copy. This is a different kind of copying which is done by one library for another. Nevertheless some of that copying too may be fair use if it is random and occasional and not systematic, and if it would have been fair use for the requesting library to itself make the copy, and if the request is limited to an unusual item which the requesting library would not normally own and could not readily obtain at moderate cost.

This indeed is the justification which the libraries advance for the Program. The Interlibrary Loan Program is bottomed on the principle that "interlibrary lending does not relieve any library of the responsibility of developing its *own* collection"[15] (italics supplied), that *each* library's collection will be sufficient to meet the normal research needs of its *own* users and that requests for material from other libraries will be limited to unusual and costly items.[16]

NLM's copying is not interlibrary loan copying as the libraries themselves define it. NLM does not do random or occasional copying nor does it limit its copying to the unusual or the costly. NLM is a "librarian's library"; its function is to systematically make copies for other libraries and commercial houses; the effect of such copying is to make it unnecessary for those other libraries (profit-

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[15] S. THOMSON, INTERLIBRARY LOAN PROCEDURE MANUAL 10 (American Library Ass'n 1971).

[16] "It is assumed that *each* library will provide the resources to meet the study, instructional, informational, and *normal research needs of its users,* and that requests for materials from another library will be limited to *unusual items* which the library does not own and *cannot readily obtain at moderate cost.* Requests for individuals with academic affiliations should be limited to those materials needed for faculty and staff research, and the thesis and dissertation research of graduate students." (italics supplied), *id.* at 2.

connected as well as non-profit) to have balanced collections sufficient to meet the normal needs of their own users. (The journals in suit are among the leaders in their field, and their cost ranges between $12 and $44 per year.) This kind of copying, as "distinguished from isolated and unrelated reproduction", cannot be fair use because it "may substitute the copies reproduced by the source library for subscriptions which the receiving libraries or users would otherwise have purchased for themselves."[17]

The New York Public Library and the libraries of Columbia, Yale and Harvard have recently announced the organization of a "consortium" to engage in the same kind of copying, but they state their purpose more frankly than do the defendant and its amici. They are joining in what the New York Times characterizes as:

> "a sweeping and controversial program of combined operations that will entail cutting back purchases of many publications and systematically exchanging photocopies of previously published writings."

The effect of this according to the New York Public Library is that it:

> "might eventually enable the library to spend 20 to 25 per cent less a year for acquisitions than it would otherwise."[18]

Systematic copying such as that engaged in by NLM and planned by the consortium can never be fair use because its purpose or effect is to substitute the copy for the original. The majority erroneously held that NLM's copying is fair use. With this as encouragement the consortium

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[17] cf. S. Rep. No. 983, 93d Cong., 2d Sess. 122-23 (1974) [hereinafter cited as "SENATE REPORT"].

[18] PACE, *Four Major Libraries Combine Research Operations*, N. Y. Times, March 24, 1974, at 59, col. 1.

says that their copying too will be fair use and therefore they have "no plan" to pay for it.[19]

Library copying such as that employed by NLM and to be employed by the consortium may be desirable. We think it clear however that that kind of library copying must pay its way; that a library engaging in that kind of copying must be recognized for what it is, an "on-demand"[20] reprinter and publisher, and that it must recognize the rights and the interests of the copyright owners if only "to protect the economic viability and continued creativity of authorship and publishing."[21]

NIH copying, on the other hand, does not even fall under the rubric of interlibrary loan copying. NIH copies for the use of its *own* large staff. As the Chief Judge stated, "One copy of the original material could not possibly be

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[19] *Id.* at col. 4.

[20] "On-demand" publishing was recently described as follows: "An author (typically a scholar with a work of strictly limited interest) deposits in a central location a camera-ready typed manuscript, which is kept in that form, or else as microfilm or microfiche. Single copies of it can then be produced from the same central location, as orders are received. A computer can be used to keep track of titles for which multiple copies are needed, and those for which demand may merit a shift in conventional publication. The advantages of such a system, Smith said, were no composition costs; no production costs except those incurred, copy by copy (probably about two cents a page), on demand; no storage cost, or wasted paper costs; and no title ever out of print." Publishers Weekly, July 8, 1974, at 44.

[21] cf. N.C.L.I.S., SECOND DRAFT PROPOSAL, *supra* note 1, at 3. "The resolution of the complex national problems of copyrights is crucial to cooperative programs. The judicially constructed doctrine of 'fair use' is only a partial answer, and the eventual solution must reconcile the rights and interests of authors, publishers and other providers of information with those of the user. New understandings about copying from network resources, especially in the context of new means of reproduction and distribution, are needed to protect the economic viability and continuing creativity of authorship and publishing."

loaned to as many requesters as the numerous photocopies. . . . While the library may look at the giving of a photocopy as a substitute for a loan, the user and would-be purchaser gets an exact copy of the original article which is a substitute for a purchased copy."

NIH copying, in this respect, is no different in kind or quality than that which a large drug company might engage in to save the cost of multiple subscriptions for its in-house staff. In each case, the copying is done in lieu of purchase of the original; in each case the publisher's market has been diminished; in neither case can fair use be a defense.

The finding of fair use is not helped by the "non-profit" element so much relied on by the majority because there is no "non-profit" exemption.[22] Defendant's wholesale copying clearly infringes and its non-profit nature is irrelevant.

Indeed, the emphasis on the non-profit character of the copying introduces a note of the absurd. If it were otherwise no author or publisher would find it possible to produce a work intended for school or hospital or government use, and no purpose would have been served by enactment of a statute permitting the United States to be sued for copyright infringement.

POINT III

There is no basis for the court's major premise: that photocopying will be halted and research hindered if defendant's copying practices are found to infringe.

The majority erred in concluding that photocopying of articles in journals will be *stopped,* with resulting injury to research and science, if judgment in favor of plaintiff is affirmed.

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[22] HOUSE REPORT, *supra* note 13, at 31.

As against the defendant, 28 U.S.C. § 1498(b) permits only a recovery of reasonable compensation, with injunction barred.

Although 17 U.S.C. § 101 authorizes injunctive relief against others, the majority's apprehension that injunction will automatically issue with consequent injury to science is unjustified. As Judge Nichols noted, courts in an appropriate case can refuse injunctive relief if equity so requires.

POINT IV

The majority decision ignores the congressional purpose that wholesale library copying be licensed and not exempted from copy fees.

The majority below appeared unaware that the House and the Senate Judiciary Committees have rejected the library proposal for a blanket exemption of library copying of journal articles; that both Committees have pressed the parties to develop workable clearance and licensing procedures for library copying,[23] and that the defendant and its amici have refused to cooperate and have instead chosen to pursue an adversary position before the court and Congress.[24]

In 1972 AAP and its fellow amicus, the Authors League, initiated a series of meetings with representatives of American Library Association (ALA), Association of Research Libraries (ARL) and others. In September 1972, acting upon a proposal of one of the library representatives, a statutory amendment was drafted which would have given journal article copying rights to libraries under

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[23] SENATE REPORT, *supra* note 17, at 122-23; HOUSE REPORT, *supra* note 13, at 31, 33.

[24] SENATE HEARINGS, *supra* note 14, testimony of W. Bradford Wiley 143-46, testimony of Jerome Weidman 175-76.

stated circumstances. However, before any of the other groups could take formal action ALA and ARL flatly rejected the compromise without identifying in what respects it was unacceptable, without offering any changes for terms that were objectionable, and without offering any alternative solution.[25]

Again in March of 1973 representatives of publishers and authors met with representatives of ALA, ARL and other library spokesmen to discuss a possible licensing system for library copying of journal articles, but again the effort failed because of library insistence on a right to copy without payment to the copyright proprietor.[26]

Notwithstanding this adamancy, AAP as it stated to the Senate Subcommittee in 1973 has remained willing to cooperate with the library associations in developing a workable clearance procedure.[27]

The majority attached no weight to this background. To it libraries should receive "the benefit of the doubt" and to it the publisher seeking payment for systematic library copying is "the dog in the manger."

In so concluding the majority sought comfort in the doctrine of judicial restraint. But, as Goldstein notes, "judicial restraint does not mean that the parties and their dispute are to be untouched by judicial action."[28] The court took no account of the unwillingness of the libraries to cooperate in the establishment of workable clearance

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[25] *Id.* at 146.

[26] *Id.* at 173.

[27] "We recognize the need for workable clearance procedures. By their very nature, however, they should be established by mutual agreement, not unilaterally or by statutory fiat. We have offered before and offer again to cooperate with the library associations in working out the necessary arrangements." *Id.* at 145.

[28] Goldstein, *supra* note 6, at 211.

arrangements as requested by the House and Senate committees. And it took no account of the public need and the constitutional imperative for encouragement and incentive to authors and publishers.

POINT V

Foreign law and practice do not justify the majority's decision.

The majority relied to some extent on foreign copyright law and practice. As Chief Judge Cowen said, there was no reason to delve into foreign legislation; what was needed was a reading and interpretation of the 1909 Copyright Act.

The Court should be aware however that the majority was mistaken in its view of foreign law. In France the court has recently decided that the National Science Center, a counterpart of NLM, was guilty of violation of French copyright law for pursuing practices virtually identical with those of NIH and NLM.[29]

In Holland, pursuant to Article 17 of The Netherlands Copyright Act, as amended by the Law of October 27, 1972,[30] a regulation has been issued, to become effective August 25, 1974, requiring libraries and other non-profit institutions to pay a copying charge to the copyright proprietor for copying of journal articles and small portions of books.[31]

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[29] *Masson & Cie, et al.* v. *Centre National de la Recherche Scientifique*, (Le Tribunal de Grande Instance de Paris Jan. 28, 1974) (France).

[30] The Netherlands Copyright Act of 1912, as amended, Oct. 27, 1972, in World Intellectual Property Organization, Copyright, No. 9, at 181 (Sept. 1973).

[31] Publishers Weekly, July 15, 1974, at 63.

The majority referred to a 1968 UNESCO and BIRPI Committee report which recommended that libraries should have the right to provide their patrons with copies of journal articles. It was unaware, however, that the Intergovernmental Copyright Committee meeting in December 1973 determined that the question "is not yet ripe for taking a definitive stand" and that the study should be continued.[32]

CONCLUSION

The Court's construction and application of basic copyright law were wrong and should be corrected. If carried to logical extreme they would largely undercut the entire law of copyright.

We respectfully suggest that the interests of the parties and those of the copyright-interested community may be served by a determination that library photocopying prior to the date of this court's decision should be exempt from liability but that photocopying such as that practiced by NIH and NLM after that date shall constitute infringement.

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[32] World Intellectual Property Organization, Copyright, No. 2, at 55-56 (Feb. 1974).

Accordingly we respectfully urge that the judgment of the Court of Claims be reversed.

Respectfully submitted,

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July 25, 1974

SUPREME COURT, U. S.

FILED

JUL 25 1974

(Submitted with the Consent of the Parties)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,

Petitioner,

—v.—

THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

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INDEX

	PAGE
Interest of The Authors League	1
Preliminary Statement	2
Summary of Argument	3
POINT I—The Constitutional Purpose of Copyright is Frustrated by Denying Petitioner Compensation for the Reproduction of its Copyrighted Articles	4
POINT II—Reproduction of "Single Copies" of An Article Infringes Rights Granted in Section 1(a) of the Copyright Act	10
(a) The Right "to copy"	10
(b) The Right "to Print" or "to Reprint"	14
(c) The Right to "Publish"	14
POINT III—The Government's Reproduction of Petitioner's Articles was not Fair Use	15
POINT IV—Reversal of The Majority Opinion is Required to Achieve the Reasonable Solution—Licensing Systems	23
CONCLUSION	27

TABLE OF AUTHORITIES

PAGE

American Visuals Corporation v. *Holland*, 239 F.2d 740 (2d Cir. 1956) 14

Brady v. *Daly*, 175 U.S. 148 (1899) 16

Douglas v. *Cunningham*, 294 U.S. 207 (1935) 12, 16

Harper v. *Shoppell*, 26 Fed. 519 (S.D.N.Y. 1886) ... 12

Herbert v. *The Shanley Co.*, 242 U.S. 591 ..... 21, 24

Macmillan Co. v. *King*, 223 Fed. 862 (D. Mass. 1914) 14

Mazer v. *Stein*, 347 U.S. 201 (1954) 5, 10

United States v. *Loew's, Inc.*, 371 U.S. 38 (1962) .. 18, 20

United States v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948) 18

Werckmeister v. *American Lithographic Company*, 134 Fed. 321 (2d Cir. 1904) 14

White v. *Kimmeli*, 193 F. 2d 744 (9th Cir. 1952) ... 14

The Williams & Wilkins Company v. *United States* 487 F.2d 1345 (Ct. Cl. 1973) 2, 12, 15, 16

F.W. Woolworth Co. v. *Contemporary Arts, Inc.*, 344 U.S. 228 (1952) 16

Constitution

U. S. Constitution, Art. I, § 8 4–5

Statutes

Copyright Act, 17 U.S.C. § 1(a) ..2, 3, 10, 11, 12, 13, 14, 21

1 U.S.C. § 1 14

28 U.S.C. § 1498(b) 4, 24, 25, 26

PAGE

Reports

H.R. Rep. No. 83, 90th Cong. 1st Sess. . . 12, 13, 16, 17, 22, 23

Other Material

Henry George, Progress And Poverty 6

73 C.J.S. Property Sec. 1 6

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BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

Interest of The Authors League

The Authors League is a national society of professional writers and dramatists; one of its principal purposes is to express their views on fundamental issues of copyright law. The League files this brief (with the parties' consent) because the Court of Claims decision raises questions of enormous importance and grave concern to professional authors.

Preliminary Statement

The majority opinion (487 F.2d 1345) held that the "wholesale, machine copying and distribution of copyrighted material by defendant's libraries on a scale so vast that it dwarfs the output of many small publishing companies" is—"fair use". Consequently, the Court denied the plaintiff reasonable compensation for the reprints of its copyrighted articles produced by the libraries. The quoted description of the libraries' activities is Chief Judge Cowen's (487 F.2d 1364); but it accurately delineates the large reprint publishing operation conducted by the government's libraries at substantial cost to the public. "Business-as-usual" payments are made to the Xerox Corporation (in the form of per-page "royalties") and to the suppliers of other equipment and materials, and normal compensation is paid to library employees for their services in operating and supervising this wholesale reproduction service. Judge Cowen's description also fits the "one-at-a-time" reprint publishing operations conducted by other library networks, and by commercial firms, including the highly successful Xerox subsidiary, University Microfilms.

The rights at issue here are those secured to authors by Sec. 1(a) of the Copyright Act. The majority below ruled that these rights do not permit authors, or publishers who acquire the rights from them, to secure compensation when libraries reproduce copies of their copyrighted works for patrons. This ruling could diminish or destroy the author's income from the medium which first disseminates his work, from other media which may subsequently reproduce and distribute it, and from the new single-copying medium created by improvements in reproduction tech-

nology. The ruling will also seriously injure private-enterprise publishing which is essential to professional authors and their readers. By reducing publishers' income and prospective income, all authors (including scientists and scholars who submit articles without compensation, and profit by kudos, promotion and other substantial emoluments) may suffer an even more drastic injury—the ultimate discontinuance of a periodical, journal or publishing house. The majority's opinion rationalizes its result by invoking the "public interest"; but its concept of the "public interest" is myopic and self-defeating. In the end, the public interest and science would be seriously injured by the Court of Claims' decision.

Summary of Argument

I. The Court of Claims flouted the Constitutional purpose of the copyright clause by denying petitioner compensation for the government's production of copies of its articles. Dissemination of scientific articles is impossible unless publishers invest labor and money to edit and produce their journals. Compensation for use of their articles in the new medium of "one-at-a-time" reproduction is essential to meet rising costs and help provide a reasonable reward for continuing an economically marginal enterprise that benefits science and the public interest.

II. The rights "to copy", "to print" and "to reprint", granted to copyright owners in Sec. 1(a) (17 U.S.C.) include the reproduction of copies of copyrighted works, one-at-a-time. The right "to publish", granted by the section, includes the circulation of copies, one-at-a-time, one to a user.

III. The government's wholesale reproduction of copyrighted articles was not "fair use", whether or not it damaged petitioner or will adversely affect the potential market for its articles and journals. In any event, there was more-than-ample evidence that the government's systematic reproduction service would have that adverse effect: i.e. ultimately reducing present subscriptions, foreclosing new subscriptions, and reducing petitioner's income from licenses to libraries and reproduction centers to reproduce "single copies".

IV. Congress has refused to legislate a reproduction licensing system, so that the majority cannot achieve the stated aim of its opinion, i.e. to compel such legislation. The Congress' "preferred" solution is voluntary licensing systems negotiated by copyright owners and librarians. The majority opinion prevents that. If it is reversed, Sec. 1498(b) [28 U.S.C.] provides the necessary impetus and protection to both sides so that they must voluntarily negotiate mutually acceptable licensing arrangements.

POINT I

The Constitutional Purpose of Copyright is Frustrated by Denying Petitioner Compensation for the Reproduction of its Copyrighted Articles.

As Chief Judge Cowen indicated, the majority opinion of the Court of Claims contradicts the "economic philosophy" underlying the copyright clause of the Constitution. It does so needlessly (see Point IV) and at grave risk to the public interest it purports to serve.

Article I, Section 8 authorizes Congress to secure to authors "the exclusive rights in their respective writings."

The power is not merely discretionary. The phrase "Congress shall have the power" does not precede the copyright clause. It prefaces all the powers granted to Congress including the powers to collect taxes, borrow money, regulate commerce and raise armies. Obviously, Section 8 intended that Congress would enact copyright laws, as well as exercise these other vital functions.

As this Court stated in *Mazer* v. *Stein*, 347 U.S. 201 (1954), the copyright clause "was intended to grant valuable, enforceable rights to authors, publishers, etc. . . . 'to afford greater encouragement to the production of literary (or artistic) works of lasting benefit to the world.'" (at p. 219). The "economic philosophy" behind the copyright clause, said the Court:

> "is the conviction that encouragement of individual efforts by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"

Thus, the Constitution provides that the public interest in securing the creation of literary and scientific works be promoted by having authors and publishers depend on a private enterprise-property rights system: i.e., property rights in the works they create (17 U.S.C. 1 & 101) and dependence on personal gain from these property rights to compensate for their talent, labor and risks. The oft-painful consequence of this "economic philosophy" is that "sacrificial hours devoted to such activities" may result in losses rather than gains.

The author's copyright is not a form of property which is detrimental to the public interest. It is not an antitrust "monopoly". It does not give him control of the market in

books, only over specified uses of the particular work he created—which must compete in the market place with thousands of other works. Moreover, his property rights do not prevent others from using his ideas or writing on the same subject. As Henry George aptly noted:

> "Copyright . . . . does not prevent any one from using for himself the facts, the knowledge, the laws or combinations for a similar production, but only from using the identical form of the particular book or other production—the actual labor which has in short been expended in producing it. It rests therefore upon the natural, moral right of each one to enjoy the products of his own exertion, and involves no interference with the similar right of any one else to do likewise . . . .
>
> The Copyright is therefore in accordance with the moral law—it gives to the man who has expended the intangible labor required to write a particular book or paint a picture security against the copying of that identical thing." Henry George, PROGRESS AND POVERTY, p. 411.

A copyright, like all other property, is "a creature and creation of law . . . " (73 C.J.S. PROPERTY, Sec. 1, p. 145) Like all other property, it is a bundle of exclusive rights granted by the state, through legislation or court decision. Thus, property rights in billions of dollars worth of land, oil and other natural resources have been created by Acts of Congress. Yet there is one distinction between the Copyright Act and these other statutes. They granted individuals exclusive rights in resources that belonged to the Nation, that were part of the public domain. The Copyright Act grants the author exclusive rights in something that he created and that belonged to him under common law; and it ultimately takes his creation from him and places it in the public domain.

In denying petitioner reasonable compensation for the use of its property, the Court of Claims flouted the Constitutional purpose of the copyright clause. Obviously, the dissemination of scientific articles from petitioner's journals serves the public interest. But that dissemination is made possible only by petitioner's labor and investment. Unless it selected the articles from a mass of manuscripts, edited them, set them in type, bound them and distributed them—the Xerox machines at NLM and NIH could only have churned out blank pages.

The very purpose of the copyright clause is to permit petioner to receive reasonable compensation for its indispensable efforts from those who reproduce or make other uses of its copyrighted works. And that compensation should not be limited to subscriptions or reprint sales lost now or in the future because of the wholesale reproduction service operated by the government's libraries. This systematic reproduction of articles on demand is a separate medium for distributing them; as distinct from the distribution of the original journals as the distribution of mass-market paperback reprint editions is from the sale of the original higher-priced hardcover editions of the same books. Under the Copyright Act, petitioner is entitled to compensation for the use of its property in this separate medium, just as authors and publishers of sheet music were entitled to compensation when their compositions later were disseminated in other media (radio, motion pictures and television), and as the authors of hardcover books were entitled to receive compensation when their works were subsequently reproduced in paperback editions (or reproduced in anthologies, newspapers or other media).

The reasonable compensation which petitioner asked the Court of Claims to set would not have "stopped" the systematic reproduction of journal articles by NIH and NLM. Their reproduction service operated vigorously despite vastly greater payments to the Xerox Corporation, other suppliers and library employees—all for the purpose of producing and distributing reprints of petitioner's articles, and other copyrighted works. The Xerox Corporation, for example, received a specified fee for each page of each copy of petitioner's articles reproduced by the government libraries. And had the libraries ceased paying their employees, these people would have stopped reproducing petitioner's articles. But since no further tangible contribution was required from plaintiff to reproduce copies of its already-published articles, why—the Court of Claims may have theorized—bother to pay it?

The "economic philosophy" of the copyright clause answers this question. The state cannot expect publishers or professional authors—independent entrepreneurs—to *continue* investing their talent, time and money in the creation or publication of new copyrighted materials, if it permits others to appropriate the fruits of their labor without reasonable compensation. As the record amply demonstrates, the publishing of medical and scientific journals, while richly serving the public interest, is at best a marginal economic operation. Where there are profits, they are modest; neither the petitioner nor the learned societies for whom it published some journals grew fat from these periodicals.

Squeezed by ever-increasing costs and static circulations, publishers inevitably will be forced to close down some jour-

nals if they are denied reasonable compensation for the uses of their material in the new medium of systematic, one-at-a-time reproduction of articles. Periodicals and journals are neither immortal nor immune from the laws of economics. Faced with rising costs and limited revenues, the publishers of many ostensibly successful commercial periodicals—e.g. LIFE, LOOK, SATURDAY POST, etc. etc.—were forced to terminate their existence. The death throes of some scientific and technical journals may last longer, and their inevitability may not be neatly provable, to the satisfaction of the Court of Claims. But given that Court's decision, it is only a matter of time before the same fate overtakes some of these periodicals.

Moreover, the "economic philosophy" of the copyright clause envisions that the copyright owner will receive not merely the marginal income needed to sustain his publication, but also compensation for his labor and risk—i.e., "gain" which, under a private enterprise system, is "the best way to advance the public (interest)" in securing the creation and publication of scientific articles or other copyrighted works. That gain* can only be earned through payments from those who exercise the copyright owner's rights in his work—e.g. by reproducing copies of it. Those payments may come from the ultimate users, as part of their purchase price of copies; or it may be paid by institutions or governmental agencies which choose to provide those copies, without charge. As we have noted, NIH and NLM

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* "Gain is not a dirty word when applied to private, entrepreneurial authorship and publishing. The "gain" on one book or journal is used by its publisher to issue other books or journals that are not likely to make money, or are certain to lose it. The author's gain on a successful book must sustain him through the periods when other books are commercially unsuccessful.

made substantial payments out of public funds to the Xerox Corporation, suppliers and library employees in order to provide users with hundreds of thousands of reprints of copyrighted articles, including petitioner's. The Court of Claims may have assumed that publishers are so addicted to their work that, unlike these other "materialists", the thinnest carrot will suffice to keep them plodding along. But this Court made no such niggardly assumption in explicating the "economic philosophy" of the copyright clause, in *Mazer* v. *Stein.*

POINT II

Reproduction of "Single Copies" of An Article Infringes Rights Granted in Section 1 (a) of the Copyright Act.

(a) The Right "to copy"

To buttress its conclusion of "fair use", the majority opinion contends that the right "to copy" in Section 1 (a) may not apply to books and periodicals; and that the reproduction of "single copies" of petitioner's articles, "one-at-a-time", therefore might not be a right granted it by the Copyright Act.*

The opinions of Chief Judge Cowen and Trial Judge Davis, and the petitioner's brief, discuss the cases and authorities which refute this theory. We add these comments:

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* The sole basis for the majority's theory is that the dial on the Xerox machine is set at "1" each time rather than "25" or "50". If the machine ran off several copies at one time (its capacity is hundreds) even the majority would concede this was "printing" or "reprinting".

(i) The term "single copy" is a euphemism. NIH and NLM produce one copy to fill each request. If 100 individuals order a copy of the same article, the libraries produce one copy to fill each request; i.e., the libraries produce 100 "single copies", one-at-a-time, to fill the orders. Other large libraries and library networks can engage in the same systematic one-at-a-time reproduction. Commercial reproduction services, such as University Microfilms (a Xerox subsidiary), now produce and distribute "single copies" of copyrighted books, periodicals, articles, doctoral theses and other works, under license from copyright owners—using the same Xerox process employed by the government's libraries. Vast duplication of copyrighted works can be carried on by commercial and non-profit reproduction centers —creating an accumulation of single copies of the same work, made at different times. The "copies" are exact reproductions of the original type, as are the copies produced by a letter press or an offset press. The majority's erroneous and unfounded interpretation of the right "to copy" would inflict devastating injury on authors and publishers.

(ii) Sec. 1(a) grants the right "to copy", flatly and unequivocally, to all classes of copyrighted works, including books, periodicals and articles. Its plain language leaves no room for a crippling, judicial limitation on the rights of authors and publishers. Nor is the majority's extreme, semantic surgery warranted by a 90 year-old lower court decision under an earlier copyright act, containing different language; and to boot, a decision that does not even

support the majority's theory—*Harper* v. *Shoppell*, 26 Fed. 519.*

(iii) In *Douglas* v. *Cunningham*, 294 U.S. 207 (1935) this Court recognized that damages should be awarded, "even for the circulation of a single copy . . ." (210) Since circulation of a single copy is a right granted by Section 1(a), it is impossible to construe the same section as meaning that reproduction of the single copy—no less reproduction of several single copies, one-at-a-time—is not a right granted thereunder.

(iv) In its Report on the Copyright Revision Bill passed by the House in 1967, the Judiciary Committee said:

> "Unauthorized library copying, like everything else, must be judged a fair use or an infringement on the basis of all the applicable criteria and the facts of the particular case." (No. 83, 90th Cong. 1st Sess., p. 36)

The majority opinion below read the report "as affirmatively recognizing that, under *existing* law (emphasis added), library photocopying can be fair use in proper circumstances". (487 F2d. 1361) But in the very same sentence, the Report also recognizes that library photocopying ["supplying single photocopies"—p. 36] is infringement, in appropriate circumstances under present law. In both aspects, the sentence negates the majority's theory

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* The District Court ruled it was not infringement, under the 1870 Act, to make a "plate from which a copy of a portion of (plaintiff's) book could be reproduced". But, it held, the copyright would be infringed "by printing, publishing, importing, selling, or exposing *any copy* of the book." (p. 520) (emphasis added). The Xerox machines of NIH and NLM did not produce plates, they produced copies of petitioner's articles.

that the right "to copy" does not apply to articles or books. If library reproduction of single copies is sometimes infringement, it must be encompassed by the rights granted the copyright owner in Section 1(a). If library reproduction is sometimes fair use, the same result: since "fair use" is a defense offered when the defendant's use of the work is one covered by the rights granted to copyright owners. Had the Judiciary Committee thought the present law did not grant the right to produce "single copies", its discussion of library and educational photocopying would have been drastically different. (see pp. 29 to 38, ibid.)

(v) Under the fundamental rules of federal statutory construction, the right to reproduce copies—granted in Sec. 1(a) of Title 17—applies to one copy or several copies. Title 1, U.S.C. provides:

> *"Sec. 1: Words denoting number, gender and so forth.*
>
> In determining the meaning of any Act of Congress, unless the context indicates otherwise—
>
> Words importing the singular include and apply to several persons, parties or things;
>
> Words importing the plural include the singular;"

Citing this statute in its discussion of Sec. 106 of the Revision Bill (counterpart of present Sec. 1), the House Report said that "The references to 'copies or phonorecords', although in the plural, are intended here and throughout the bill to include the singular." (Ibid, p. 24)

(b) The Right "to Print" or "to Reprint"

The reproduction of copies by typewriter or mimeograph machine constitutes "printing" or "reprinting" under Sec. 1(a). *Macmillan Co.* v. *King*, 223 Fed. 862, 867; *American Visuals* v. *Holland*, 239 F. 2d 740, 745; *White* v. *Kimmell*, 193 F.2d 744. Obviously, reproduction on a Xerox machine is "printing" under the Section. The machine can produce anywhere from 1 to hundreds of copies. Like a letterpress or offset press, its copies reproduce the text as originally set by some typesetting device. Under Sec. 1(a), printing occurs whether the letterpress, offset press or Xerox machine turns out 1 copy or 999 copies; cf. 1 U.S.C. 1, discussed above.

(c) The Right "to Publish"

The government's libraries systematically distributed copies of petitioner's articles and other copyrighted works to thousands of patrons and users. Under its normal practices, established by the record, it was ready and willing to distribute copies of the same article to any of a number of people who chose to order it. This systematic procedure, coupled with the actual distribution of even one copy, constitutes "publishing" under Section 1. *Werckmeister* v. *American Lithographic Company*, 134 Fed. 321, 325-6; *American Visuals Corporation* v. *Holland*, 239 F.2d 740, 743; *Macmillan Co.* v. *King*, 223 Fed. 867-8. It should be noted that distribution of one copy to each ultimate user is traditional in publishing. Book stores sell one copy to each customer, for his personal use. Book clubs mail one copy to each customer, for his personal use.

POINT III

The Government's Reproduction of Petitioner's Articles was not Fair Use.

The majority reversed the Trial Judge's decision on the ground that defendant's reproduction of plaintiff's articles was fair use. Chief Judge Cowen's dissenting opinion rebuts the majority's erroneous application of the fair use doctrine. For the reasons set forth in Judge Cowen's opinion, the Trial Judge's opinion and the plaintiff's brief, we submit that the government's reproduction of the Williams & Wilkins' articles was infringement and not fair use, and that the company was entitled to reasonable compensation for such use of its copyrighted works. We add these comments:

(i) The majority opinion recognized that it was not doing justice to the petitioner: "Hopefully, the result in the present case will be but a 'holding operation' " until "Congress enacts its preferred solution." (487 F.2d 1363).

(ii) The majority's conclusion of fair use relies heavily on the view that petitioner failed to prove actual or potential injury. Actually it proved both. The majority simply waved aside the trial judge's conclusions, in its effort to rationalize its basic theory—i.e., Congress should be compelled to legislate a solution. For reasons indicated below, the fair use test of damage was amply satisfied. But we submit that the type of copying operation conducted by NIH and NLM cannot be held fair use, even if injury could not be proven under that test. As Chief Judge Cowen emphasized, the government libraries engaged in the wide spread production of "exact duplicates of (and substitutes for) the

original articles . . . ." Such "wholesale copying . . . without more defeats the defense of fair use." (487 F. 2d 1366)

(iii) If such reproduction is excused as fair use when the copyright owner cannot prove he has suffered damage, the rights of authors and publishers would be seriously impaired. Difficulty in proving actual damages is endemic to copyright. That is why the Act provides for statutory damages. *Brady* v. *Daly*, 175 U.S. 148, 154; *Douglas* v. *Cunningham*, 294 U.S. 207, 209; *F.W. Woolworth Co.* v. *Contemporary Arts*, 344 U.S. 228. Moreover, damage may be inflicted by a drawn-out process of attrition; the accumulation of many individual, minor infringements over a period of time. To prevent this "coral reef-building" effect, courts award damages even for "uninjurious and unprofitable invasions of copyright . . . to sanction and vindicate the statutory policy." *F.W. Woolworth Co.* v. *Contemporary Arts*, 344 U.S. 228, 233.

(iv) As the House Judiciary Committee Report emphasizes, the Courts must "adapt the fair use doctrine to particular situations on a case-by-case basis." (p. 32). The situation here involves systematic, wholesale reproduction of journal articles for the very readers, the very audience, for whom petitioner publishes its journals. The question of isolated, sporadic copying of an article is not involved. Trial Judge Davis believed that such copying of an entire article, under appropriate circumstances, would be fair use. But there was no need to spell out the parameters of isolated, sporadic copying in that category, since the systematic wholesale reproduction involved here clearly is not fair use. Nor would the opinions of Trial Judge Davis or Chief Judge Cowen determine the boundaries of fair use in educational

"single copying". As the Judiciary Committee's Report demonstrates, in setting out the guidelines for the application of fair use in that area, such reproduction must be evaluated in light of the circumstances presented there.

(v) The fair-use damage test, when applicable, requires consideration of the "effect of the use upon the potential market for or value of the copyrighted work." (House Judiciary Committee Report No. 83, p. 30). The majority contended sufficient proof of an adverse effect was not presented, arguing that petitioner did not make an in-depth economic survey which "proved" it would occur in the future. We submit that there are more-than-ample grounds for finding that the government's systematic reproduction of journal articles is likely to have an adverse effect on the potential market and value of scientific and technical journals published by petitioner, the American Chemical Society, the American Society of Microbiology, American Society of Testing and Materials, the National Council of Teachers of Mathematics and various University Presses. That adverse effect may be produced in various ways: decline of current subscriptions, loss of potential new subscriptions, and loss of income from the sale of reprints and licenses (by the copyright owner) to reproduce single copies.

(vi) With its suggestion that only hard and fast economic proof of future damage will suffice, the majority's ruling would preclude authors and publishers from protecting their works against the types of unauthorized use that produce damage through a gradual accumulation of individual, minor infringements. The defense of fair use would be available until the gradual movement of economic forces

produced sufficient injury to satisfy the majority's standard; but by that time, the publisher might be so far down the road to bankruptcy that a decision in his favor would be useless. We submit it is the possibility of damages in the future, rather than this year's operating statement, that must be considered under the fair-use damage test. For example: in *U.S.* v. *Loew's Inc.*, 371 U.S. 38, the defendant motion picture companies argued that their block-booking of motion pictures for television could not be an antitrust (tying) violation because "Feature films, they point out, constitute less than 8% of television programming . . ." in 1962. We dare say they could have produced any number of economic studies to support that claim, and to "prove" that no injury could possibly be suffered in the future from their practices. But the potential for future and increasing damage was inherent in the practice. And in 1974 "Feature films" are no longer the trifling 8% the film companies cited, they are the predominant, money-making bulwark of commercial television.

(vii) The potential for damage inherent in the government's systematic, wholesale reproduction of journal articles is amply apparent. A copyright owner's compensation depends on the number of uses of his work. If it is informative, educational or entertaining, a number of people will want to read it; their purchases of copies or subscriptions provide his compensation and reward. This Court has stressed that the copyright owner's reward should thus depend on the value of his work. (cf. *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 158).

As the demand increased among library patrons, there was a partial increase in the copyright owner's compensa-

tion. If there was a heavy demand for a successful book, the library might buy 5 or 10 copies, not just 1. If a number of patrons wanted to read articles in a scientific journal, the library might buy 3 or 4 subscriptions for these patrons, rather than 1.

(viii) The government's wholesale, systematic reproduction of journal articles, including petitioner's, has the inherent potential for totally destroying that relationship between use and the copyright owner's compensation—if the copyright owner is denied reasonable payment for these uses of his work. Where an institution's library serves its staff (as the NIH library does) only one or two subscriptions are required to meet the needs of an unlimited number of patrons who find the journal periodically publishes articles of use to them. The systematic reproduction of these articles, one-at-a-time, on demand, replaces the 3 or 4 or more subscriptions that otherwise would be needed. As Chief Judge Cowen noted, prospective patrons determine which articles to order by reading a monthly, indexed catalog (INDEX MEDICUS) published by NLM; similar abstracts and indices are available in other disciplines. Patrons could not make these copies themselves since the library will not release the one or two subscription copies of each issue; this would prevent it from making copies for other patrons, and might result in damage or loss which would compel it—heaven forbid—to purchase another copy from the publisher.

(ix) The government's systematic, wholesale reproduction also has the potential of denying petitioner and other journal publishers compensation bearing any relation to number of uses and value—when one library serves as

a reproduction center for other libraries and their patrons. NLM performs that function for several libraries and countless potential users of petitioner's journals. These libraries do not have to purchase even a single subscription to petitioner's journals; no matter how many patrons require how many articles, all are obtained by ordering reprints from NLM. With a conspicuous lack of semantic integrity, library spokesmen describe these transactions as "loans"—although each copy becomes the absolute property of the user, who does not return it. The countless patrons of other libraries, who receive "single copies" from the reproducing library, could not make the copies themselves—their libraries do not have the journals.

(x) The majority contended that the static circulation of petitioner's journals negated the potential for damage inherent in the government's systematic, wholesale reproduction operations. We disagree. The decline of *present* subscriptions over the next few years is as probable as the mushrooming of the trifling 8% role of feature films on television, to the predominant place they have captured over the 14 years following the *U. S.* v. *Loew's* decision. The recent announcement of plans by a consortium of 4 major libraries, discussed in petitioner's brief, is a foreboding harbinger of the future in store for journal publishers under the majority's opinion. Moreover, the majority failed to consider the impact of systematic reproduction on the sale of *new* subscriptions—a factor which cannot be measured with the mathematical preciseness the majority demanded. As Chief Judge Cowen noted, even a modest decline in subscriptions or the inability to secure a few new ones (to cope with inflating costs) can be fatal to scientific and technical journals which have limited circulations.

(xi) The government's systematic, wholesale reproduction of copies of petitioner's articles must adversely affect its income from the sale of reprint copies, and from licensing commercial and non-profit reproduction centers to reproduce such copies, one-at-a-time, on a royalty basis. The majority seems to suggest that the latter is not a "legitimate" source of income. It is as if this Court had found for Shanley's restaurant (*Herbert* v. *The Shanley Co.*, 242 U.S. 591) on the theory that composers derived their income in 1917 from the sale of sheet music, and therefore were not entitled to begin earning income by licensing users to perform their music.

Actually most copyright owners earn compensation from their works by licensing others to reproduce or perform them. Composers and sheet-music publishers license broadcasters to perform their songs, and record companies to record them. Authors and book publishers license others to reproduce copies of their works—e.g. book clubs, paperback reprint publishers, newspapers and magazines, anthologists, and recently, University Microfilms which reproduces single copies of older books, under license, to fill orders for works conventionally "out-of-print." Petitioner and other journal publishers are equally entitled to license "one-at-a-time" reproduction of their articles, each of which is a separate copyrighted work, and thus derive income from an ever-increasing audience of users who benefit from the efforts, labor and investment of these publishers. Only thus can the intended balance between volume of use and the copyright owner's compensation be partially maintained.

(xii) The rights granted to authors and publishers in Section 1(a) are not subject to a "for profit" limitation,

as are the public performance rights of music (House Report No. 83; p. 31). Indeed, such an exemption would destroy or seriously impair the copyright owner's rights in any work published for educational, scientific or technical audiences. Hence, the non-profit status of NLM and NIH does not entitle them to systematically reproduce copyrighted articles. Nor is the defense of fair use available on the theory the copies are produced for the personal use of scientists or researchers.* This is precisely the audience for whom plaintiff and other such publishers produce their journals. And every book and journal is published to be used by individual readers for study, information, research or other personal uses.

(xiii) As the opinions of Chief Judge Cowen, Judge Nichols and Trial Judge Davis conclusively establish, a judgment for petitioner would not stop the reproduction or dissemination of its articles, or the reproduction and dissemination of articles by other scientific and technical journal publishers. The petitioner would simply receive reasonable compensation for the use of its property rights; the reproduction would continue.

(xiv) The "Gentlemen's Agreement" was not signed by petitioner. It was not signed by any author. It was not signed by any association representing authors. In any event, such a document would not permit a Court to rule that fundamental rights granted to authors under the Copyright Act could be surrendered for all time, for all authors

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* These copies are not substitutes for note-taking. Hours of tedious labor would be required to copy a 10 or 20 page printed article by hand. When true "notes" are not sufficient, and the entire text is required, people buy copies of books and journals. That is what the government provides—a reproduction of the entire type-set text of the article, not a collection of hand-written notes.

and publishers. Even "Gentlemen" don't have that power; the Constitution gave it to Congress. Certainly a document prepared by two trade associations in 1935 could not establish a "custom" binding on individuals and organizations who were not represented, three decades later when technology had radically changed media of communication and created new ones. Indeed, "custom" cannot be legislated into existence by contract. If these associations of publishers and librarians had combined or contracted to restrain individual authors or publishers from enforcing their rights under the Copyright Act, that combined action or such contract would violate the Sherman Act and would be illegal and unenforceable. A court should not permit these two associations or their members to achieve the same forbidden result by judicially approving a so-called "custom" which they sought to establish through an "agreement".

POINT IV

Reversal of The Majority Opinion is Required to Achieve the Reasonable Solution—Licensing Systems.

Obviously, the majority was extremely uncomfortable with the decision. Terming it a "holding operation", the majority pleaded with Congress to legislate a "solution". But Congress has flatly refused to do so. The Judiciary Committee said it "does not favor a specific (statutory) provision dealing with fair use." (Report No. 83, p. 36). And it specified the solution it recommended—that publishers and users voluntarily establish "reasonable arrangements . . . providing workable clearance and licensing conditions . . ." (Ibid).

The majority erroneously assumed that such arrangements could not be established "voluntarily". It erred. Had Judge Cowen's opinion been adopted, licensing systems inevitably would have been established; and the refusal of any publisher to agree to reasonable terms would not have "stopped" library reproduction because of the provisions of 28 U.S.C. 1498(b).

Actually, the successful copyright licensing systems in this country are "voluntary", i.e. their structure and terms are not prescribed by statute. Following the decision in *Herbert* v. *Shanley*, systems for licensing the public performance of music were developed by copyright owners and users—they had no other choice. Composers knew that countless users would continue to perform their music, throughout the country; and copyright owners could not afford to continue bringing costly infringement suits for "small performances".* Both copyright owners and users needed an automatic licensing system; and they developed one, in fact several: ASCAP, Broadcast Music, Inc. and SESAC. Similar circumstances led to the voluntary establishment of nation-wide licensing systems for authorizing the thousands of performances of plays and musical comedies given annually by amateur and stock production groups. Moreover, the preponderance of licenses to record musical compositions are negotiated voluntarily through an industry-wide clearing house, not under the so-called compulsory license clause of the Copyright Act [Sec. 1(e)]. Actually, the compulsory-license clause does not establish

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* The license fee for an individual performance is minor; often only a few cents. Performance fees produce income because the licensing system permits collection of a large aggregation of these minor payments.

a licensing system. It simply allows the recording of musical compositions, without the author's consent, at a fixed royalty of 2¢ a record. This inflexible approach would not serve the interests of publishers, librarians or library users.

The establishment of "voluntary" licensing systems for library reproduction of journal articles, the solution expressly preferred by Congress, is inevitable if this Court reverses the decision below and adopts Chief Judge Cowen's conclusion. Under Sec. 1498 (b) (Title 28), the government libraries will be free to continue reproducing the articles of petitioner or any other publisher who does not wish to negotiate a reasonable licensing system, mutually acceptable to the libraries and the publisher(s). Neither petitioner nor any other publisher can afford to continue bringing such suits. Their costs would far exceed the modest compensation the Court of Claims will award. Copyright owners and librarians will be left no choice but to negotiate mutually satisfactory licensing arrangements. These will not be frozen into a statute, but can be jointly revised and adapted to changing conditions and the differing needs of various classes of users.

The majority argued that Sec. 1498(b) would not assure non-governmental libraries that publishers would negotiate voluntary, mutually acceptable licensing systems. However, the many government libraries could provide reproduction service to private libraries with respect to articles of any publisher which refused to negotiate mutually acceptable licensing arrangements. Moreover, any non-governmental library "acting for the Government and with the authorization or consent of the Government", in systematically reproducing copies of articles without the publisher's

consent would be subject to the provisions of Sec. 1498(b). It would be free to continue reproducing articles, and the publisher would be entitled to recover reasonable compensation from the United States.

Just as copyright owners cannot afford to continue bringing suits under Sec. 1498(b), library officials will not be in a position to continue provoking such suits by refusing to negotiate reasonable licensing arrangements. Sec. 1498(b) provides the necessary impetus (and protection) to both users and copyright owners to accomplish the voluntary licensing solution urged on them by the Congress.

The majority opinion offers no hope of a reasonable solution. Congress has refused to legislate licensing. Library representatives have twice broken off discussions with representatives of learned-society and private journal publishers, university presses and authors—discussions aimed at negotiating voluntary, mutually acceptable solutions to the library copying problem.* The majority opinion will only make them more intransigent.

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* Hearings Before the Subcommittee on Patents, Trademarks and Copyrights, Committee on the Judiciary, United States Senate (93rd Congress, 1st Session, July 31 and August 1, 1973), pp. 144, 146, 175.

CONCLUSION

It is respectfully submitted that the decision of the Court of Claims should be reversed, and that judgment should be entered for the plaintiff on the findings and conclusions of the Trial Judge.

Respectfully submitted,

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LIBRARY
SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-1279.

THE WILLIAMS & WILKINS COMPANY,
Petitioner,

—against—

THE UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Claims.

BRIEF AMICI CURIAE FOR AMERICAN SOCIETY FOR TESTING AND MATERIALS NATIONAL COUNCIL OF TEACHERS OF MATHEMATICS AMERICAN SOCIETY FOR MICROBIOLOGY Editor-in-Chief, JOURNAL OF UROLOGY

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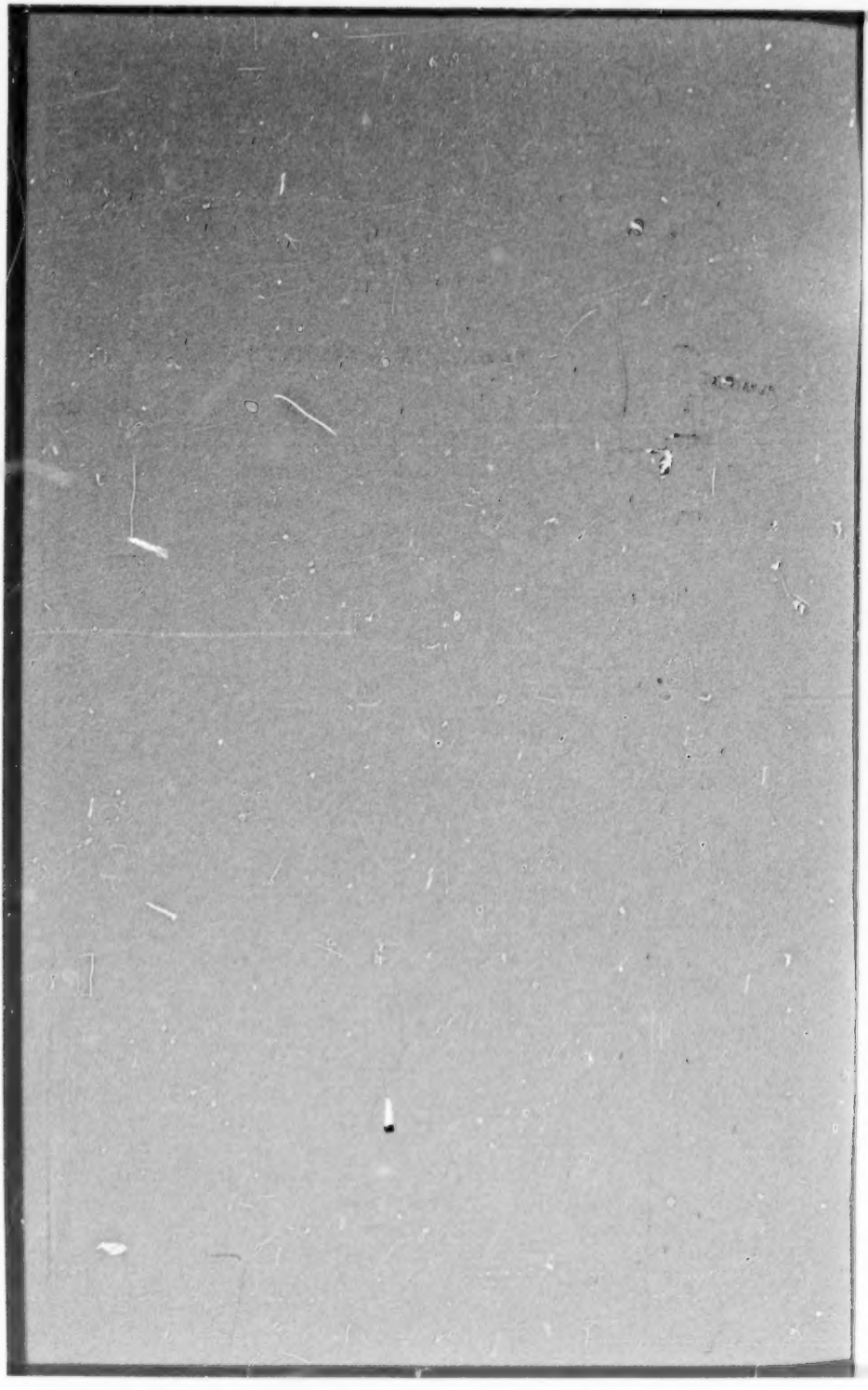

TABLE OF CONTENTS.

	Page
The Interest of Amici Curiae	2
American Society for Testing and Materials	2
National Council of Teachers of Mathematics	2
American Society for Microbiology	3
Editor-in-Chief, Journal of Urology	5
The Purpose of This Brief	6
Definitions and the Opinions Below	7
Facts	8
The Art of Xerography	8
The Art of Printing	16
Conclusion	20

TABLE OF AUTHORITIES.

Cases: Page

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THE WILLIAMS & WILKINS COMPANY
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF AMICI CURIAE FOR

AMERICAN SOCIETY FOR TESTING AND MATERIALS
NATIONAL COUNCIL OF TEACHERS OF MATHEMATICS
AMERICAN SOCIETY FOR MICROBIOLOGY
Editor-in-Chief, JOURNAL OF UROLOGY

With the consent of both parties, the AMERICAN SOCIETY FOR TESTING AND MATERIALS, NATIONAL COUNCIL OF TEACHERS OF MATHEMATICS, AMERICAN SOCIETY FOR MICROBIOLOGY and the Editor-in-Chief of the JOURNAL OF UROLOGY respectfully submit this brief. The letters of consent have been filed with the Clerk of this Court.

THE INTEREST OF AMICI CURIAE.

American Society for Testing and Materials.

The AMERICAN SOCIETY FOR TESTING AND MATERIALS is a scientific organization formed in 1898 for the purpose of promoting knowledge of the materials of engineering and standardizing specifications and methods of use. It is a nonprofit corporation having tax-exempt status as a charitable organization. The Society has more than 20,000 members. These include individuals, corporations, associations, governmental departments, universities and other bodies, technically qualified to carry on the work of the Society. At the present time ASTM has on hand and for sale more than 4,700 publications furnishing standardizing specifications for engineering materials and methods of testing such materials. Nearly 75% of its income is derived from the sale of its publications notwithstanding the Society freely grants to scholars, engineers and scientists the right to reference, to extract, or to use selected portions of its publications without charge. However, since the early 1920's copies of entire documents or reprints, whether they be single or multiple copies, are assessed a charge. Accordingly, if any substantial number of its approximately 50,000 customers were to obtain one copy of an ASTM publication from a photocopier, without payment to ASTM for the privilege, the loss to the Society would be severe.

National Council of Teachers of Mathematics.

The NATIONAL COUNCIL OF TEACHERS OF MATHEMATICS (NCTM) was organized in 1920. Its purpose is to assist in promoting the interests of mathematics in America and to vitalize and coordinate the work of local organizations of teachers of mathematics. The NCTM, the only organiza-

tion of its type, has had a major influence on the teaching of mathematics. Outstanding persons in mathematics education have been leaders and participants in its program. It has served as an agency for both the coordination and stimulation of major efforts to improve the teaching of mathematics.

The NCTM publishes four journals: *The Mathematics Teacher; The Arithmetic Teacher; The Mathematics Student Journal;* and *The Journal for Research in Mathematics Education.* NCTM also publishes yearbooks on particular problems and numerous books and pamphlets on a wide range of topics. It has 47,000 individual members with 30,000 institutional subscriptions to *The Mathematics Teacher* and *The Arithmetic Teacher.*

NCTM is interested in this suit because of its belief that reasonable compensation from photocopy users is vital to the long-range economic health of specialized scholarly journals such as the ones published by NCTM. Continued publication of these journals provides to teachers and their students the most significant type of access to scholarly papers in their respective fields.

American Society for Microbiology.

The AMERICAN SOCIETY FOR MICROBIOLOGY (ASM) is a nonprofit scientific society, founded in 1899. As stated in its *Constitution:* "The objects of the SOCIETY shall be to promote scientific knowledge of microbiology and related subjects through discussions, reports, and publications, to stimulate scientific investigations and their applications, to plan, organize, and administer projects for the advancement of knowledge in this field, to improve education in the science, to promote programs of professional recognition, and to foster the highest professional and ethical standing of microbiologists."

ASM, with its more than 19,000 members, is the dominant microbiological society in the U. S., and, because microbiology, with its emphasis upon single living cells and the molecular events which occur within them, dominates modern biology, ASM is the largest biological society in the U. S.

ASM currently publishes seven scientific journals, each of which is a leader or the leader in its respective field: *Journal of Bacteriology, Journal of Virology, Infection and Immunity, Applied Microbiology, Antimicrobial Agents and Chemotherapy, Bacteriological Reviews,* and *International Journal of Systematic Bacteriology.* An eighth scientific journal (*Journal of Clinical Microbiology*) will commence publication in January 1975. ASM also publishes *ASM News,* a monthly news magazine, as well as a number of books, pamphlets, etc.

The ASM Operations Budget for the fiscal year ending 30 June 1975 provides for total disbursements of $2,571,625, of which $1,959,400 will be expended upon publications. Thus, ASM is a "publishing" society, as are most organizations primarily comprised of research scientists.

The research process is not complete until the research results have been effectively communicated to those who need and can benefit from those results. Thus, we know why we are in the publishing "business" and we believe that it is of fundamental importance that we stay in this "business." It is for this reason that we join in this brief.

We are convinced that wholesale copying of our publications seriously depresses our publication income. We have seen a drop in our nonmember subscriptions, and this certainly traces to copying of our materials in the libraries. Copying technology should be used as an effective aid in the dissemination of scientific research results. However, those who copy should contribute to the costs of publication.

Otherwise, the communication process faces eventual destruction.

Editor-In-Chief, Journal of Urology.

The Journal of Urology was founded in 1917 and became the official publication of the American Urological Association in 1920. Its purpose is to offer to the medical profession scientific contributions in urology that are considered to be of educational or of practical value. Urologists, not unlike other specialists in medicine, have a responsibility for education, research and practice. The Journal of Urology is considered an important spoke in the wheel of activities fulfilling this responsibility.

Dr. Hugh J. Jewett has been associated with the Journal since the late 1930s and became Editor-in-Chief in 1966. During this period this publication has developed into an important instrument for doctors in urology as well as related fields. There is an absolute need for this Journal, which is acknowledged to be the leading periodical in its field.

Currently, the Journal of Urology is issued monthly to more than 12,000 subscribers, the majority of whom are practicing urologists in the United States and in many foreign countries. About 3,500 of these subscribers are members of the American Urological Association. The Journal is published in two volumes yearly, each volume consisting of approximately 1,000 pages of text and illustrations. The publication depends on the monies it receives from subscribers, advertisers and back volume and reprint sales.

Dr. Jewett is interested in the suit because of his concern over the economic consequences "free" photocopying of articles will have on the future of the Journal. If individuals are allowed to obtain from libraries copies of only

those articles in which they are interested, the Journal of Urology as well as comparable publications are going to lose subscribers. Subsequently, the advertisers' revenue will be decreased since the advertising rates depend on the number of subscribers. He, therefore, believes that the Journal must be supported, in one way or another, by all those who use the contents between its covers. If the Government is successful in its suit with The Williams & Wilkins Company, Dr. Jewett is convinced that it will mean destruction of the economic system upon which the Journal was founded and upon which it continued to grow since 1917.

The AMERICAN SOCIETY FOR TESTING AND MATERIALS, NATIONAL COUNCIL OF TEACHERS OF MATHEMATICS, AMERICAN SOCIETY FOR MICROBIOLOGY, and the Editor-in-Chief, JOURNAL OF UROLOGY, support the decision of the Trial Judge James F. Davis and three dissenting Court of Claims judges that respondent's massive system of reproducing single copies of copyrighted articles is an infringement of the copyright.

THE PURPOSE OF THIS BRIEF.

One of the points touched on in the brief of the petitioner is whether or not xerography is in fact printing and/or reprinting within the meaning of 17 U. S. C. § 1(a).[1] This brief will be directed solely to that question, by way of an explanation of the art of xerography, particularly in conjunction with microfilm.

---

1. "§ 1. Exclusive Rights as to Copyrighted Works.—Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work:"

DEFINITIONS AND THE OPINIONS BELOW.

Section 1(a) of the Copyright Law provides the copyright owner with the exclusive right "to print, reprint, publish, copy and vend the copyrighted work". The Trial Judge James F. Davis found that "NLM and the NIH library did not merely 'copy' the articles in suit; they, in effect, 'reprinted' and 'published' them." He pointed out that: 'Printing' and 'reprinting' connote making a duplicate original, whether by printing press or a more modern method of duplication. *MacMillan Co. v. King,* 223 F. 362 (D. Mass. 1914); M. Nimmer, Copyright §102 (1971 ed.)."[2]

On review, the majority of the Court of Claims made the observation[3] that the photocopy process of NIH and NLM does not even amount to printing or reprinting in the strict dictionary sense.[4]

It is submitted that the definition of Trial Judge Davis accords with usage. For example, it would appear to be reflected in this Court's current definition of "printing" for the purposes of its rules. Rule 39(4) now states that "Printing", as used in the Rules, "shall include any process capable of producing a clear, black image on white paper, but shall not include ordinary carbon copies."

---

2. 172 U. S. P. Q. 670, 678.

3. 487 F. 2d 1345, 1349, 180 U. S. P. Q. 49, 53.

4. Actually, the word "print" is defined (Webster's Third New International Dictionary) as "to make a copy of by impressing paper against an inked printed surface *or by an analogous method*". [Emphasis added.] The word "reprint" is defined as "a subsequent printing of a book already published having the identical text of the previous printing. The word "reprint" is also defined as "an article or extract issued separately after being first published as part of a collection or in a periodical". The word "reprint" in verb form is defined as "to print again; make a reprint of".

FACTS.

The findings of the Court of Claims adopt the following undisputed facts found by the Trial Judge:

> "15. . . . The NIH photocopying service uses two Xerox copying machines and two Recordac microfilm cameras. The microfilm cameras are used in conjunction with a Xerox Copy-Flo Printer to provide NIH personnel with permanent copies of journal articles . . ."[5]
>
> "21(b). To make photocopies NLM uses mobile 35-mm microfilm cameras which have an electrical power line overhead and can move up and down an aisle of the library. Full-size photocopies are then made from the microfilm. Most photocopies are made by such microfilm technique . . ."[6]

THE ART OF XEROGRAPHY[7]

In recent years dry photographic processes have come into extensive use in the photocopy field. Foremost among these processes are those involving electrophotography in which photoelectric phenomena are utilized to form electrical images. These processes were given the new name of "xerography" which is derived from Greek and has a literal meaning of "dry writing".

Xerographic processes have been incorporated in equipment for copying and duplicating, in automatic ma-

5. Finding of Fact 15, Petition Appendix 80.

6. Finding of Fact 21(b), Petition Appendix 84.

7. The following description of xerography including the figures has been digested from *Electrophotography* by Dr. R. M. Schaffert published by The Focal Press (1965). For another comprehensive book on xerography see *Xerography and Related Processes* edited by J. H. Dessauer and H. E. Clark, published by The Focal Press (1965).

chines for photography, microfilm enlarging, facsimile printing, and printing of computer data.

Five steps are usually involved in making a print by xerography:

(1) Sensitizing the xerographic plate by electrical charging;

(2) Exposing the plate to form a latent electrostatic image;

(3) Developing the latent image with fine particles;

(4) Transferring the developed image to paper or other materials; and

(5) Fixing the image by fusing.

The plate can be cleaned and used over and over again for hundreds or even thousands of exposures.

One way of performing the step of developing the latent image is called impression development. This involves a system of developing electrostatic images with a series of rollers which have been described by Schaffert as "somewhat analogous to the inking roller system used in printing presses." It is to be noted that this system is capable of high speed development and good prints have been produced at speeds of 30 inches per second surface velocity. The time required to produce a print by xerography is primarily dependent upon the speed of image development since other steps in the process are usually of short duration.

One of the well-known copying machines is the Xerox * 914 * copier. This is a desk-size copying machine in which all operations are automatic, except for insertions of documents or other materials to be copied. The units for charg-

* Trademarks of Xerox Corporation.

ing, exposing, developing, transferring and cleaning are appropriately stationed around the circumference of the drum, and all of these operations take place in sequence as the drum rotates. The developer is a mixture which cascades over the drum surface and is then collected and recirculated in the developer unit. Paper sheets are fed from the paper supply rack into the transfer station and are then conveyed through the fusing unit and out onto a receiving tray, as shown in Fig. 1.

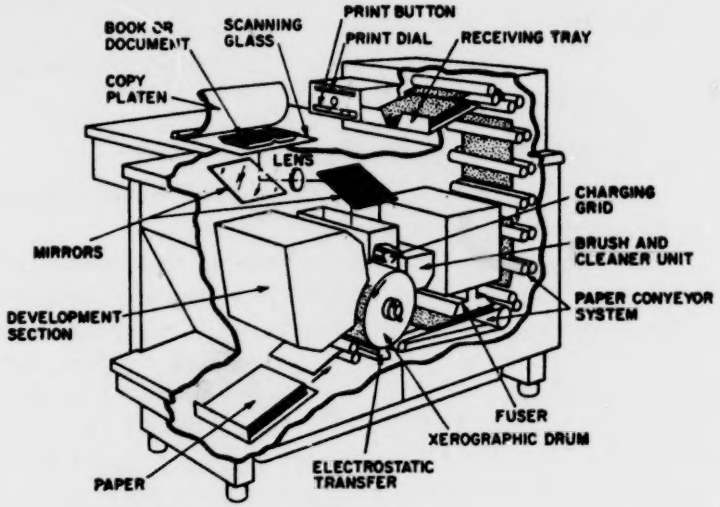

FIG. 1

The machine is capable of copying book and magazine pages as well as single-sheet documents. The paper on which the printing is made requires no special properties. Copies can be made on ordinary paper or on such sheets as vellum or offset paper masters. Copying speed, after a brief warm-up period, is 30 seconds for the first print, and 6 prints per minute thereafter. A more recent ma-

chine of this class is the Xerox 2400 * which is designed to produce copies at the rate of 2400 per hour.

One of the most recent machines is the Xerox 7000 * which is a versatile high-speed duplicator with a choice of five reductions. Originals up to 14" x 18" may be copied on 8½" x 11" copy paper and the copies can be made at the rate of 3600 copies per hour. This machine includes numerous other sophisticated features such as automatic sorting of copies, copying two documents at once with or without sorting, copying photographs and 3-dimensional originals, and double-side duplicating. This machine is also useful as a signature ** maker for making booklets with printing on both sides of the pages.

The first application of xerography to automatic continuous copying was in the field of microfilm enlargement. A xerographic machine for producing enlarged prints from microfilm was developed by the Xerox Corporation for the U. S. Navy in 1953. Since 1953 Xerox Corporation has produced a series of automatic copying machines under the trademark Copyflo.* These are rather large machines designed for high-volume output. The principle of operation of the Copyflo machines is illustrated in Fig. 2. The xerographic process used in such machines is similar to that of the Xerox 914 except that the paper is fed from a roll, and the printed copy is rewound on a take-up roll. Copy production is at the rate of 20 linear feet per minute.

Persons skilled in the art of xerography have equated electrostatic copying machines to plateless printing presses. As pointed out by Schaffert at page 144:

> "The Xerox Copyflo machines can be regarded as plateless printing presses, the plate being replaced

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* Trademarks of Xerox Corporation.

** "Signature" is the trade term for a multi-page printed sheet, folded to form a booklet.

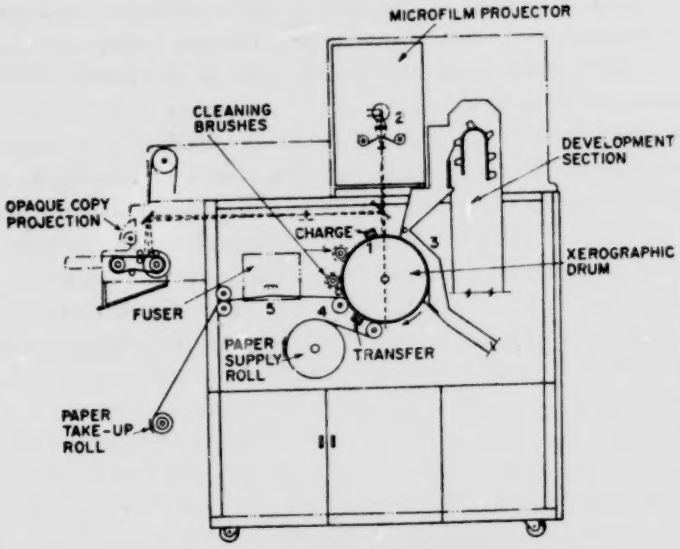

FIG. 2.

by a transparency, a piece of microfilm, or a sheet of paper containing the subject matter to be printed. The speed of 20 feet per minute, however, would be too slow for the usual commercial printing job. Nevertheless, when relatively few copies are needed, these machines can become quite useful, particularly in reprinting out-of-print materials. For example, it is quite feasible to print a single copy or several copies of an entire book either directly from an existing copy or from microfilm. Presumably, photocopy machines utilizing zinc-oxide papers could also be adapted to handle similar printing jobs." (See footnote 7.)

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8. It has been noted that the NIH library photocopy service employs 2 Xerox copying machines and 2 Recordac microfilm cameras in conjunction with a Xerox Copyflo printer. See p. 12, *supra*.

In addition to the Xerox Copyflo machines,[8] there are other known electrostatic printing presses. For example an electrostatic printing press has been developed by Harris-Intertype Corp. for the U. S. Army and a similar printing machine was developed from Radio Corporation of America for the U. S. Army Engineer and Development Labs. The Xerox Corporation has also developed for the U. S. Air Force an automatic xerographic printer which makes finished continuous-tone positive prints from photographic negatives. The machine was designed primarily for use in high speed, high volume printing from aerial film for mapping and reconnaissance purposes.

Xeroprinting is a by-product of the development of xerography. Xeroprinting is the name given to an electrostatic printing process designed to print many copies of a subject, document or page from a master plate or cylinder. The printing master or plate consists of a metal sheet or cylinder upon which is imprinted an image in the form of a thin, insulating coating. The image areas consist of insulating material and the background areas are bare metal.

When the master plate is electrically charged by passing it under a corona charging unit, the charges deposited on the insulated image remain on the image surface and those deposited on the bare metal areas are conducted away to ground. Thus an electrostatic image corresponding to the insulated areas is formed. From this point on, the making of a print follows a sequence of steps similar to xerography, i.e., the image is developed with powder, transferred to paper, and the powder fused to the paper. A drawing of an experimental xeroprinting press made in 1948 is shown in Fig. 3. This press was operated at printing speeds up to 1200 feet per minute.

It thus clearly appears that xerography is not only analogous to traditional printing but it actually resembles

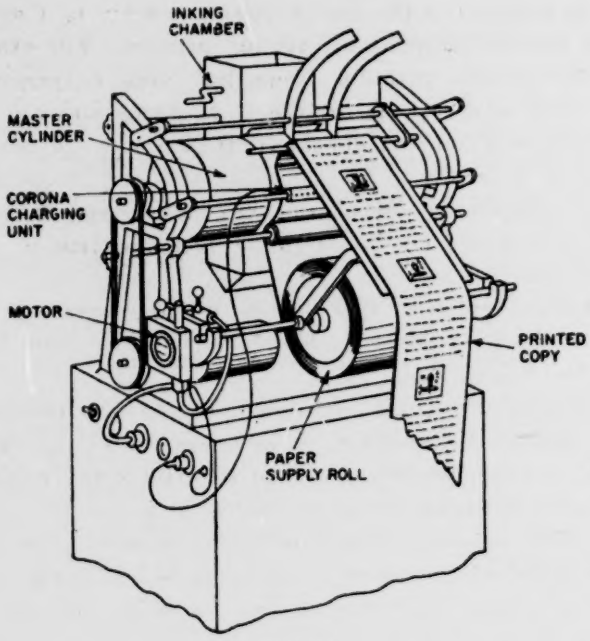

FIG. 3

printing in important details. When we turn our attention to variant forms of printing—utilizing photographic or the more modern photoelectric techniques—the parallel is even more striking.

When more than a few copies of a document are required it is usual to employ one of the duplicating processes. One of the best known is offset duplicating which is essentially a special type of lithographic printing. One of the first commercial applications of xerography was in the preparation of offset paper masters. The powder image was simply transferred from the selenium plate to an offset master sheet and bonded to the sheet by heat fusing. After

the usual chemical treatment of the sheet it was attached to the cylinder of the duplicating machine. Thousands of copies could then be printed if needed. The lithographic principle requires that the printing areas be ink receptive and water repellent, and that the background or non-printing areas be water receptive and ink repellent. The fused xerographic powder which contains a high proportion of water repellent resins was found to be ideally suited for the preparation of paper offset masters.

This application of xerography provided a rapid photographic method of preparing offset masters. The conventional steps of processing negatives and the photo-mechanical operations of preparing plates were eliminated. The simplicity, speed, and flexibility of the method led to a multitude of uses in the duplicating and reprinting of documents and other materials that carried far beyond the normal routine of office duplicating. Old documents could be reprinted with deletions and additions if required, and records could be reproduced and brought up to date.

The success of xerography in offset duplicating led to the investigation of potential applications of xerographic techniques in commercial lithographic printing. Paper-base lithographic printing plates, such as those obtained by transfer from selenium xerographic plates, are suitable for short runs up to perhaps 10,000 impressions. For larger runs and for multi-color printing the greater durability of metal plates is required. A process for converting a xerographic metal plate into a lithographic printing plate has been shown to be feasible in the laboratory although it has not found wide commercial usage as yet. In the highly competitive industry of commercial printing, printing quality is of prime importance. New processes, therefore, must measure up to quality control standards before they can become established in this field.

As pointed out by Schaffert at page 143:

> "In the gap that separates the long-run printing job and small-run duplicating job, xerographic techniques have found a place of importance. For many years there has been a need for economical production methods applicable to short-run printing of certain types of books, pamphlets, and other limited distribution publications, and for the reprinting of out-of-print materials in limited quantities. The preparation of printing plates for such jobs by conventional methods may prove to be too costly and time consuming. It is in this area that lithographic plates made by xerography show promise of making worthwhile contributions to the art of printing." (See footnote 7.)

THE ART OF PRINTING.

The dictionary definitions with regard to printing and reprinting have been set forth at page 7 of this brief. In order to put them in the proper perspective it must be recognized that prior to the invention of printing documents and books were in the form of manuscripts written by scribes. The process of printing has been contrasted with the method of writing in an early copyright decision of *Keene v. Wheatley et al.*, 14 Fed. Cas. 180, 192 (No. 7644). (C. C. E. D. Pa. 1861). In that decision it was stated:

> "Writing is a method of originally developing the composition, and of adding copies made singly, letter by letter. *Printing is a process of multiplying the copies, by sheets.* Thus the difference is that between multiplication and addition. Human means of increasing the number of copies by writing are extremely limited. By printing, they may, on the contrary, in the words of Lord Cranworth, be multiplied indefinitely. 4 H. L.

> Cas. 833. The books printed by those who first publicly practiced the typographic art in Europe usually contained an advertisement that they were not written, as all books had previously been, but were made by a new invention, whereby the several sheets were stamped at once, and not made line by line as formerly." [Emphasis added.]

As noted above, the Trial Judge found that NLM and the NIH library were not only "printing" and "reprinting" but also "publishing". He stated:

> " 'Publishing' means disseminating to others, which defendant's libraries clearly did when they distributed photocopies to requesters and users." [See footnote 2.]

In *Keene v. Wheatley et al., supra,* the Court also had occasion to consider the meaning of the word "publish" in the copyright law in connection with the general distribution of a printed book, and stated ". . . the delivery of a *single copy* to a subscriber is a public circulation." (14 Fed. Cas. 192). [Emphasis added.]

While printing traditionally has been associated with the setting of type and a printing press, many changes have taken place in the printing art since the days of Gutenberg.[9] This has been judicially noted in a variety of settings. For example, the Patent Laws (35 U. S. C. 102),[10] like the Copyright Law, include reference to printing.

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9. For a glimpse of what the future holds for printing, see "Good-by to Gutenberg", January 24, 1966 issue of *Newsweek,* pages 85-88.

10. § 102. A person shall be entitled to a patent unless—
   a. the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or
   b. the invention was patented or described in a printed publication in this or a foreign country or in public use

In 1971 the Court in *Philips Electronic and Pharmaceutical Industries Corp. v. Thermal and Electronics Industries, Inc.*, 450 F. 2d 1164, 171 U. S. P. Q. 641 (3rd Cir. 1971) had before it the question of whether the microfilm of a German patent application was a prior "printed publication" within the meaning of 35 U. S. C. 102(a). The Court noted the "modern copymaking techniques and the widespread commercial, industrial and educational use of microfilm as well as its use in our libraries and data storage banks". The Court further noted:

> ". . . there have been revolutionary developments in techniques for reproduction, printing and dissemination of documents and data. The traditional process of 'printing' is no longer the only process synonymous with 'publication.' The emphasis, therefore, should be public dissemination of the document, and its availability and accessibility to persons skilled in the subject matter or art.
>
> The field is rapidly undergoing change and improvement. To restrict our interpretation of Section 102(a)'s 'printed' publication requirement solely to the traditional printing press would ignore the realities of the scientific and technological period in which we live and the underlying rationale of Section 102. We hold, therefore, that the term 'printed' as used in Section 102 can include documents duplicated by modern methods and techniques, including the now well established process of microfilming. Whether or not an individual microfilm is a 'printed' publication

10. (Cont'd.)

> or on sale in this country, more than one year prior to the date of the application for patent in the United States, or . . .

within the meaning of the statute is *a question of fact* which ought to be determined by the application of criteria consonant with modern day methods of printing, duplicating and disseminating documents." (171 U. S .P. Q. 645) [Emphasis by Court.]

The Court approved the findings of the trial court that the German application, as microfilmed and indexed, was available and accessible, with the exercise of reasonable diligence, to persons ordinarily skilled in the art and that the application was a "printed publication" under the statute.

The Government as represented by the Patent Office also has had occasion to construe the meaning of "printed publication" under 35 U. S. C. 102 with respect to microfilm. In *Ex parte Garbo,* 141 U. S. P. Q. 913 (P. O. Bd. App. 1962) the Board of Patent Appeals had before it the question of whether or not a microfilm of a German patent application could be considered "prior art". The German patent application had been recorded on microfilm and offered for sale in the Bibliography of Scientific and Industrial Reports, Office of Technical Services, U. S. Department of Commerce. Garbo contended that the microfilm citation was neither "printed" nor "published" prior to his filing date. The Patent Office Board of Appeals in holding that such a microfilm was a "printed publication" under the statute made the following observation:

> "In the citation at hand, the Government undoubtedly went to considerable expense in accumlating the material contained in the microfilmed disclosures of which the citation is a part. The sole purpose of this expenditure was to make the information available to all who could use it. The Government in choosing microfilm as a vehicle selected the only economical

low cost method available to it for making this information available to the entire metal founding industry. It seems incongruous that the best of efforts by our Government to make more knowledge available shall come to naught through the patent system in effect nullifying these efforts by ruling that they are insufficient in law to accomplish the purpose for which they were intended." (141 U. S. P. Q. 916)

From the foregoing it is clear that under the Patent Laws the term "printed" can include documents duplicated by modern methods and techniques, including xerography and the now well established process of microfilming. It seems incongruous that the Government in construing the Copyright Law does not consider that making "Xerox" copies is equivalent to printing when as stated in "Good-by to Gutenberg",[11] "Xerography and other copying techniques have already turned every office mailroom into a publishing house."

CONCLUSION.

The decision of Trial Judge Davis is consistent with the constitutional purpose of the Copyright System and soundly concludes that the making of copies of whole articles whether by printing presses or a more modern method of duplication is proscribed by the Copyright Law.

Respectfully submitted,

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11. See footnote 9.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,

Petitioner,

against

THE UNITED STATES,

Respondent.

BRIEF OF THE MAGAZINE PUBLISHERS ASSOCIATION, INC., AS AMICUS CURIAE

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TABLE OF CONTENTS

	PAGE
Interest of The Magazine Publishers Association, Inc.	1
Preliminary Statement	3
Facts	4
Summary of Argument	5
Point I—The importance of this case extends beyond the interests of the parties	5
Point II—The unauthorized copying of copyrighted periodicals constitutes infringement	9
Point III—The Court below erred in concluding that petitioner's entire copyrighted articles could be copied with impunity under respondent's "fair use" defense	11
Point IV—The Court below erred in requiring proof of serious economic detriment to the copyrightee to negate "fair use"	12
Conclusion	13

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Cases:

Benny v. Loew's Incorporated, 239 F.2d 532	12
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Mazer v. Stein, 347 U.S. 201	7

PAGE

Robert Stigwood Group Limited v. O'Reilly, 346 F. Supp. 376 12
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THE WILLIAMS & WILKINS COMPANY,
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BRIEF OF THE MAGAZINE PUBLISHERS ASSOCIATION, INC., AS AMICUS CURIAE

Interest of The Magazine Publishers Association, Inc.

The Magazine Publishers Association is a national trade association founded in 1919 and organized as a membership corporation under the laws of the State of New York. (For convenience of reference, The Magazine Publishers Association may sometimes hereinafter be called "M.P.A."). M.P.A. is presently composed of approximately 130 members who publish more than 420 magazines. Such magazines are distributed in almost all cases nationally throughout the United States, and are issued at various intervals, such

as each month or each week, although most are monthly publications. In the aggregate, these magazines have a circulation of approximately 200,000,000 copies per issue; it has been credibly estimated that their combined readership exceeds 89% of the literate adults in the United States.

The publications of M.P.A.'s members run the gamut of reader interest and concern—they possess a rich diversity—ranging from those of general circulation and appeal to those of limited circulation and special appeal.

The Magazine Publishers Association is reputed to be the largest organization of consumer magazines in this country.

In virtually all cases the magazines published by M.P.A.'s members are statutorily copyrighted. This is so because magazine publishing inescapably involves entrepreneurial risks, and one meaningful way to safeguard one's investment in such venture is for a publisher to acquire for each of his publications the exclusive rights status that valid copyright is designed to afford. Furthermore, M.P.A. has, among its standing, active and important committees, its Legal Affairs Committee, whose duties include advising M.P.A. on significant cases and developments in the law of copyrights.

M.P.A. has joined in amici briefs in this Court. It filed its own amicus brief in this case in support of petitioner's application for the writ of certiorari, which writ this Court recently granted.

The Magazine Publisher's Association reaffirms on this appeal its support of petitioner's position on the issue of copyright infringement.

M.P.A. files this brief (with the written consent of the parties) because, as will be more fully considered hereafter under Point I hereof, this case has, we submit, such transcendent meaning as to make it important to copyright proprietors in general and particularly to those who own copyrights in and to composite works, such as magazines.

Preliminary Statement

The case below, reported at 487 F. 2d 1345 (1973) was decided in respondent's favor by a closely divided United States Court of Claims. The petitioner claimed in that Court that its statutory copyrights to certain of its composite medical journals had been infringed by respondent's unauthorized, wholesale machine copying and distribution of *entire articles* published in those journals. Such copying and distribution were done by respondent through its National Institutes of Health (N.I.H.) and its National Library of Medicine (N.L.M.). For such alleged infringement, petitioner sought reasonable compensation from the Government under the applicable jurisdictional statute. Although petitioner had succeeded on the issue of liability before the Trial Judge, the Court of Claims itself, by a four-to-three vote, reversed and, as above indicated, held for the respondent on the theory that respondent's accused conduct constituted no more than fair use, *i.e.*, non-infringing use, of petitioner's copyrighted journals. The holding below exonerated the respondent despite its unauthorized,

extensive machine copying or photoduplicating of *complete, discrete copyrighted articles* and its subsequent widespread, albeit not-for-profit, distribution of such copies or photoduplicates to and among putative medical researchers and medical libraries.

Facts

The relevant facts, as found by the Trial Court and accepted largely by the Court below, are succinctly stated at page 673 of the Trial Court's opinion (172 USPQ 670). Such statement reads in material part as follows:

> "The N.I.H. library . . . subscribes to two copies of each of the journals in suit . . . Demand by N.I.H. research workers for access to plaintiff's journals . . . is usually not met by in-house subscription copies. Consequently, as an integral part of its operation, the library runs a photocopy service for the benefit of its research staff. On request, *a researcher can obtain a photocopy of an article from any of the journals . . .* Usually, researchers request photocopies of articles to assist them in their on-going projects; *sometimes photocopies are requested simply for background reading . . ., the library does not monitor the reason for requests or the use to which the photocopies are put. The photocopies are not returned.* . . .
>
> ". . ., N.L.M. cooperates with other libraries and like research- and-education-oriented institutions . . . in a so-called 'interlibrary loan' program. Upon request, N.L.M. will loan to such institutions, . . ., books and other materials . . . . In the case of journals, the 'loans' usually take the form of *photocopies of journal articles* which are supplied . . . free of charge and *on a no-return basis.* The term 'loan' therefore is a euphemism when journal articles are involved." (Italics ours.)

Summary of Argument

1. The decision below, especially its rationale,

   (a) has a significance reaching far beyond the conflicting interests of the parties to this litigation, and

   (b) raises erroneous doubts as to what constitutes a copyright infringement by "copying" insofar as periodicals, including magazines, are concerned, and

   (c) erroneously relies on the doctrine of "fair use" as a copyright infrigement defense.

2. The determination of the Court of Claims should be reversed and liability should be imposed on respondent for the infringement of petitioner's copyrights.

POINT I

The importance of this case extends beyond the interests of the parties.

While we think that the holding below is erroneous, the untenable rationale of such holding, as articulated by the majority below, is significantly more troublesome. It is, of course, the rationale which will not stay within the four corners of the particular case. To this effect it is well to note the dissent of Nichols, J. where at page 1387 he presciently observed:

> ". . . However, hedged, the decision will be read, that a copyright holder has no rights a library is bound to respect."

But even on its own factual footing, the instant case has important dimensions, as indicated by Chief Judge Cowen in his dissent below where he stated at page 1364:

> ". . . What we have before us is a case of wholesale, machine copying, and distribution of copyrighted material by defendant's libraries on a scale so vast that it dwarfs the output of many small publishing companies. In order to fill requests for copies of articles in medical and scientific journals, the NIH made 86,000 Xerox copies in 1970, constituting 930,000 pages. In 1968, the NLM distributed 120,000 copies of such journal articles, totalling about 1.2 million pages."

When broadly perceived, what really confronts us at bar is the conflict between two interests, one of an emergent nature and the other of established tenor, one interest which says I may use the modern technique of reprography so as to machine copy or photoduplicate, without let or hindrance, and whether or not the matter so reproduced is validly copyrighted, and the other, countervailing interest which says my valid copyrights are not to be so infringed.

We submit that in such conflict, reason and judicial authority are on the side of the copyrightee.

Copyrights, we urge, are not to be overwhelmed by improvements in the reproduction art, important to society as such improvements may be. It is doubtless true that sophisticated duplicating devices have made reproducing accurate, cheap, easy and quick, and dextrous as these devices may be, they are evaluatively stupid. Undoubtedly the availability of these devices, Xerox et al., has tended to make of so many of us nimble, though minor, nimmers, insofar as the copying of copyrighted material is

concerned. But such individual and private copying, in the confines of one's home or office, may perhaps be overlooked as de minimis. In any case, it is not that kind of copying that is involved at bar.

Furthermore, copyrights can and should stand on their own footing, especially those which are statutorily engendered. Such copyrights are socially desirable, as the Constitutional sanction of them demonstrates. Madison realized this when he said, writing as Publius, in Number 43 of the Federalist Papers, anent the Copyright Clause of the Constitution, that "The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged . . . to be a right of common law . . . *The public good fully coincides . . . with the claims of individuals*" (italics ours). This same appraisal of copyrights as making for societal good was stated by this Court in *Mazer* v. *Stein*, 347 U.S. 201, 219.

Moreover, it should be borne in mind that when an author or proprietor creates or owns copyrightable matter he has the choice of retaining it in its unpublished state under a so-called common law copyright or of publishing it under the panoply of statutory copyright. And here, too, the public interest comes to the fore. When such author or proprietor so publishes he makes a bargain with the public: under such quid pro quo theory the common law right is exchanged for the statutory right, a purpose of the copyright statute being to induce the author or proprietor to "bring out" the work, *i.e.*, to make it accessible to the public. (See A.H. Wasserstrom, "The Copyrighting of Contributions to Composite Works", 31 Notre Dame Lawyer 381, 395—1956).

If the decision below is to go uncorrected, the value of copyrights to magazines may be sorely diminished, if not rendered worthless. If such massive machine copying as obtained at bar should go unabated, magazines in general, and technical journals in particular, may cease to exist. Such eventuality seems not fanciful or far-fetched, especially for such publications as are in a marginal profit category. If that should come about we might find government publications filling the vacuum or government subventions shoring up the still privately owned and operated publications. In either case, the public may well be the loser, we think, because government functionaries, rather than independent copyrightees, will determine what may or may not be published. (On this serious threat of censorship, see footnote 7 of the Trial Court's opinion below at 172 USPQ 670, 676, and the perceptive study "Project—New Technology and the Law of Copyright: Reprography and Computers", 15 UCLA Law Review 931, 956 *et seq.*).

Apart from the specter of censorship, the sheer diminution in the number of privately owned and operated magazines can only lead, we believe, to a loss in diversity and robust discussion, since "the magazine" [is] "the medium *par excellence* for diverse opinion and specialized audiences. * * * In the magazine field, competition remains an acute fact of life. The magazine has become the great outlet for the multitudinous energies and values of our society, the channel of communication for the particular interests in our infinitely varied national life, the means of expression for all those ideas and views that are the concern of Americans as individuals and special

groups rather than as a broad, undifferentiated mass . . ." (see page 9 of statement of the noted historian and teacher, Arthur M. Schlesinger, Jr., submitted to the Postal Rate Commission, Docket No. R74-1, May 16, 1974).

We submit that petitioner's rights herein should be vindicated, despite the advanced technology of duplicating. If there is to be any public-interest accommodation between the *right* of the copyrightee and the *demand* of the non-commercial, machine copiest, whether institutional or otherwise, such as library or school, such accommodation, we suggest, should be made by the Congress and not by the Courts. However, the Court below wrongly rejected this approach and with unseemly self-esteem legislated on its own in respondent's favor.

POINT II

The unauthorized copying of copyrighted periodicals constitutes infringement.

The Court below entertained what it called "solid doubt" that periodicals as such come within the protective reach of copyright, insofar as copying *per se* is concerned. While this may very well have been a "solid doubt" for the Court below it is, we submit, a gratuitous doubt. The plain and unmistakable wording of the Copyright Code (17 U.S.C.) quite clearly provides in Section 1 thereof that all copyrighted works, and, of course, periodicals and composites are among such works (17 U.S.C. Section 3), are entitled to exclusivity not only as to the printing, reprinting and publishing of such works but also as to the copying thereof. As the dissent below rightly observed there seems

to be no legitimate reason for harking back to inapplicable legislative history regarding prior copyright acts. At bar, the meaning of the words used in said Section 1 should be derived from ". . . the words themselves . . ." and ". . . their setting in a text . . ." (Frankfurter, "Some Reflections On The Reading Of Statutes" 15—1947) so that here a court may quite properly "hug the shores of the statute itself" in construing said Section 1 (*ibid.*).

The Holmesian approach to reading statutes should be applied because "there is no canon against using common sense in construing laws as saying what they obviously mean" (*Roschen* v. *Ward,* 279 U.S. 337, 339).

To argue, as the Court below did, that the word "copy" may not mean "copy" is, we believe, to make of it a humpty-dumpty word, and seemingly to border on pretentious nonsense.

That the aforementioned "solid doubt" can have a seriously adverse effect on all periodicals, quite apart from those particular ones involved at bar, seems manifest because, if such doubt is to hover over this genre the OF copyrighted material, publishers of copyrighted periodicals will not know with reasonable certainty how to predict their legal rights in this context, that is, whether the copying of their works will entitle them to the same measure of protection as the law accords to other copyrighted works.

In fine, we submit, there seems to be no sound ground for excluding copyrighted periodicals from the protection of Section 1 of the Copyright Code, or of even having doubts on this score.

POINT III

The Court below erred in concluding that petitioner's entire copyrighted articles could be copied with impunity under respondent's "fair use" defense.

The Court below dismissed "as an overbroad generalization, unsupported by the decisions" (1353) the statement that "the copying of an entire copyrighted work cannot ever be 'fair use'." Such dismissal, we submit, is simplistic, and, indeed, erroneous. However, one need not take a position in this case on the making of but one, complete, unauthorized copy of a copyrighted work. What the Court below did was to permit the extensive copying, *i.e.*, the making of many copies, of articles contained within petitioner's copyrighted works on the ground that such copying constituted only fair use of such works. In the instant case we have the machine copying of several articles in their respective entireties. Such was tantamount to the copying of disparate, copyrighted works because the appropriated articles within petitioner's copyrighted journals constituted, under Section 3 of the Copyright Code, component parts of such journals. The general copyright to each journal as a whole was, under said Section, spread to the copyrightable components thereof, as if those components had been specifically copyrighted (A. H. Wasserstrom, *op cit., supra,* p. 11 at 403 *et seq.*). In short, each of the separate articles comprising the petitioner's medical journals constituted a distinct copyrighted work, even without a specific notice of copyright imprinted thereon. When such articles were unauthorizedly photocopied, petitioner's copy-

rights thereto were, we submit, infringed, and the bounds of "fair use" were overpassed. (*Benny* v. *Loew's Incorporated,* 239 F.2d 532, 537; *Wihtol* v. *Crow,* 309 F.2d 777, 780, *et seq.; Rosemont Enterprises, Inc.* v. *Random House, Inc.,* 366 F.2d 303, 310; *Robert Stigwood Group Limited* v. *O'Reilly,* 346 F.Supp. 376, 384; NIMMER, *"On Copyright",* sec. 145, p. 652.)

POINT IV

The Court below erred in requiring proof of serious economic detriment to the copyrightee to negate "fair use."

The fair use doctrine is made up of a plurality of considerations or criteria, only one of which is the adverse economic impact of the use on the potential market for, or the value of, the copyrighted work. Put another way, the fair use defense should not be available if the challenged use injuriously affects the copyrightee's rights. (*Hill* v. *Whalen & Martell,* 220 Fed. 359.) At bar, the machine copies of the whole articles were the functional equivalents of the original articles and replaced them. Hence, the copies quite clearly prejudiced the sale of the originals, and the defense of fair use should not have been invoked (Nimmer, *op. cit., supra,* 12 at pp. 646, 655, *et seq.*).

Conclusion

The decision below should be reversed, and liability should be imposed upon the respondent for the infringement of the petitioner's copyrights.

Respectfully submitted,

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SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,

Petitioner,

—against—

THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

PETITIONER'S BRIEF

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INDEX

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISION AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
1. Introduction	4
2. Petitioner and Its Journals	5
3. The Government's Operations	7
SUMMARY OF ARGUMENT	10
ARGUMENT	12
INTRODUCTION	12
I. The Constitutional and Statutory Policies Underlying Copyright Require Reasonable Compensation to Petitioner	14
II. The Government Has Not Established That Its Massive System of Reproduction Should Be Excused By the Defense of Fair Use	19
III. The Reasonable Compensation Mandate of the Jurisdictional Statute is the Appropriate Means of Resolving Competing Interests	27
IV. Nothing in the Majority Opinion Below Justified Denying Compensation to Petitioner Under the Defense of Fair Use	31
A. The Majority's Three "Core" Propositions	31
1. Harm to Petitioner	31

Page

2. Effect on Medical Research 35
3. Only a "Holding Operation" 37
B. The Majority's Other "Factors" 39
C. The Majority's "Solid Doubt" That "Copy" Means "Copy" 45
CONCLUSION 49

TABLE OF AUTHORITIES

CASES:

American Visuals Corp. v. *Holland*, 239 F.2d 740 (2d Cir. 1956) 48
Associated Music Publishers, Inc. v. *Debs Memorial Radio Fund*, 141 F.2d 852 (2d Cir. 1944) 40
Benny v. *Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), aff'd by an equally divided Court, 356 U.S. 43 (1958) 23
Blumcraft of Pittsburgh v. *Newman Bros., Inc.*, 337 F. Supp. 859 (S.D. Ohio 1971) 33
Bonnar v. *United States*, 438 F.2d 540 (Ct. Cl. 1971) 32
Chappell & Co., Ltd. v. *Columbia Graphophone Co.*, [1914] 2 Chancery Div. 745 40
Chappell & Co. v. *Middletown Farmers Market*, 334 F.2d 303 (3rd Cir. 1964) 40
Douglas v. *Cunningham*, 294 U.S. 207 (1935) 40
Dun v. *Lumbermen's Credit Association*, 209 U.S. 20 (1908) 30
Edgar H. Wood Associates, Inc. v. *Skene*, 347 Mass. 351, 197 N.E. 2d 886 (1964) 30
Edison v. *Lubin*, 122 Fed. 240 (3d Cir. 1903) 48
Folsom v. *Marsh*, 9 Fed. Cas. 342 (No. 4901) (C.C.D. Mass. 1841) 20, 21, 22
Fortnightly Corp. v. *United Artists Television*, 392 U.S. 390 (1968) 46
Foster v. *American Machine & Foundry Co.*, 492 F.2d 1317, (2d Cir. 1974), *petition for cert. filed*, May 21, 1974, No. 73-1744 30

Page

Goldstein v. *State of California*, 412 U.S. 546 (1973) 14

Hecht Co. v. *Bowles*, 321 U.S. 321 (1944) 30

Hedeman Products Corp. v. *Tap-Rite Products Corp.*, 228 F. Supp. 630 (D.N.J. 1964) 13, 32

Interdent Corp. v. *U.S.*, 488 F.2d 1011 15

Jerome H. Remick & Co. v. *American Automobile Accessories Co.*, 5 F.2d 411 (6th Cir.), *cert. denied*, 269 U.S. 556 (1925) 44, 48

Kalem Co. v. *Harper Bros.*, 222 U.S. 55 (1911) 18, 48

Kewanee v. *Bicron Oil*, 416 U.S.—, 40 L. Ed. 2d 315 (May 13, 1974) 18

King Features Syndicate v. *Fleischer*, 299 Fed. 533 (2d Cir. 1924) 13

Leon v. *Pacific Tel. & Tel. Co.*, 91 F.2d 484 (9th Cir. 1937) .. 23

Macmillan v. *King*, 223 Fed. 862 (D. Mass. 1914) 47, 49

Markham v. *A. E. Borden Co.*, 206 F.2d 199 (1st Cir. 1953) 13

Masson & Cie, et al. v. *Le Centre National de la Recherche Scientifique* (Le Tribunal de Grande Instance de Paris, January 28, 1974) (France) 45

Mazer v. *Stein*, 347 U.S. 201 (1954) 14, 19

Moorhouse et ano. v. *University of New South Wales*, 624 Austl. 1 (Supreme Court of New South Wales Equity Division, No. 2505 of 1973, May 24, 1974) 45

National Council of Young Israel, Inc. v. *Feit Co.*, 347 F. Supp. 1293 (S.D.N.Y. 1972) 32

National Geographic Socy. v. *Classified Geographic, Inc.*, 27 F. Supp. 655 (D. Mass. 1939) 49

L. C. Page & Co. v. *Fox Film Corp.*, 83 F.2d 196 (2d Cir. 1936) 48

Perma Life Mufflers v. *International Parts Corp.*, 392 U.S. 134 (1968) 29

Page

Porter v. *U.S.*, 473 F.2d 1329 (5th Cir. 1972) 17

Public Affairs Associates, Inc. v. *Rickover*, 284 F.2d 262 (D.C. Cir. 1960), *judgment vacated*, 369 U.S. 111 (1962) 23

Rosemont Enterprises v. *Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) 24

Rosette v. *Rainbo Record Manufacturing Corporation*, 354 F. Supp. 1183 (S.D.N.Y. 1973) 17

Shapiro, Bernstein & Company v. *4636 S. Vermont Avenue, Inc.*, 367 F.2d 236 (9th Cir. 1966) 40

Shapiro, Bernstein & Co. v. *P. F. Collier & Son Co.*, 26 U.S.P.Q. 40 (S.D.N.Y. 1934) 25

Teleprompter Corp. v. *CBS, Inc.*, 415 U.S. 394 (1974) 46

Tiffany Productions, Inc. v. *Dewing*, 50 F.2d 911 (D.Md. 1931) 48

Universal Pictures Co. v. *Harold Lloyd Corp.*, 162 F.2d 354 (9th Cir. 1947) 34

U.S.A. v. *ASCAP*, CCH 1940–43 Trade Cases ¶56,104; 1950–51 id. ¶¶62,594, 62,595 30

Walt Disney Productions v. *Air Pirates*, 345 F. Supp. 108 (N.D. Cal. 1972) 23

Walt Disney Productions v. *Alaska Television Network, Inc.*, 310 F. Supp. 1073 (W.D. Wash. 1969) 40

L. A. Westermann Co. v. *Dispatch Printing Co.*, 249 U.S. 100 (1919) 17

White-Smith Music Co. v. *Apollo Co.*, 209 U.S. 1 (1908) 46

Wihtol v. *Crow*, 309 F.2d 777 (8th Cir. 1962) 23

F. W. Woolworth Co. v. *Contemporary Arts, Inc.*, 344 U.S. 228 (1952) 31

Page

CONSTITUTION:

United States Constitution
Article 1, Section 8, Clause 8 ..... 2, 14
Amend. V 15

STATUTES:

1 Stat. 124 47

17 U.S.C.
§1 ..... 28, 44
§1(a) 3, 12, 13, 39, 45, 46, 48, 49
§1(c) 39
§1(e) 39
§3 ..... 4, 13
§10 ..... 44, 48
§§13, 16, 24 44
§101 13
§101(b) 2

28 U.S.C.
§1255(1) 2
§1498 29
§1498(b) 2, 4, 10, 11, 15, 17, 29

42 U.S.C.
§275 43
§280b-1 et. seq 43

REGULATIONS:

37 C.F.R. §202.8 17

FOREIGN STATUTES:

United Kingdom Copyright Statute of 1956, 4 & 5 Eliz. 2 c. 74 45

Page

CONGRESSIONAL MATERIALS:

H.R. REP. No. 2222, 60TH CONG. 2D SESS. (1909) 47
H.R. REP. No. 624, 86TH CONG. 1ST SESS. (1959) 15, 28
H.R. REP. No. 83, 90TH CONG. 1ST SESS. (1967) 27, 35, 38, 39, 41
HEARINGS ON H.R. 4347 AND OTHER BILLS BEFORE SUB-COMM. NO. 3 OF THE HOUSE JUDICIARY COMM., 89TH CONGRESS, 1ST SESS. (1965) 43
HEARINGS ON S. 1361 BEFORE THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 93RD CONGRESS, 1ST SESS. (1973) 37
S. 1361, 93RD CONG. 2D SESS. 21, 39
SEN. REP. NO. 93-983, 93RD CONG. 2D SESS. (1974) 39

BOOKS:

COMPENDIUM OF COPYRIGHT OFFICE PRACTICES (1970) 17
GEORGE FRY & ASSOC., "SURVEY OF COPYRIGHTED MATERIAL REPRODUCTION PRACTICES IN SCIENTIFIC AND TECHNICAL FIELDS," (1962) 26
NIMMER ON COPYRIGHT (1973) 25, 41
NIMMER ON COPYRIGHT (1974) 32
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PERIODICALS:

THE BUREAU OF NAT'L AFFAIRS, 157 PATENT, TRADEMARK & COPYRIGHT JOURNAL, AT D-4 (DEC. 13, 1973) 28
BUSINESS WEEK, JUNE 29, 1974, at 92 16
CHAFEE, *Reflections on the Law of Copyright*, 45 COL. L. REV. 503 (1945) 19
NEW YORK TIMES, MARCH 24, 1974 19
NOTE, 14 NOTRE DAME LAWYER 443 (1939) 20
Project-New Technology and the Law of Copyright: Reprography and Computers, 15 U.C.L.A. L.REV. 931(1968). 18

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PETITIONER'S BRIEF

THE OPINIONS BELOW

The opinion of the Court of Claims Trial Judge (Single Appendix, pages 26 through 88) was unofficially reported in the United States Patent Quarterly at 172 USPQ 670. The majority and dissenting opinions of the Court of Claims (Petition Appendix[1] pages 1 through 104) were reported at 487 F.2d 1345 and 180 USPQ 49.

[1] Printed Appendix to Petition for Certiorari, pages in which are hereinafter referred to as "Pet. App.—".

JURISDICTION

The judgment of the Court of Claims was entered on November 27, 1973. The jurisdiction of this Court to review that judgment is invoked under 28 U.S.C. §1255(1). The petition for certiorari was filed on February 20, 1974 and certiorari was granted on May 28, 1974.

QUESTION PRESENTED

Does systematic reproduction of copyrighted journal articles in their entirety by U.S. Government libraries constitute "fair use" or copyright infringement compensable under 28 U.S.C. §1498(b)?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. Article I, Section 8, Cl.8 of the United States Constitution provides in pertinent part:

> "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

2. 28 U.S.C. §1498(b) provides:

> Hereafter, whenever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States, or by a contractor, subcontractor, or any person, firm or corporation acting for the Government and with the authorization or consent of the Government, the exclusive remedy of the owner of such copyright shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation as damages for such infringement, including the minimum statutory damages as set forth in section 101(b) of title 17, United States Code: *Provided*, That a Government employee shall have a right of action against the Government under this subsection except where

he was in a position to order, influence, or induce use of the copyrighted work by the Government: *Provided however*, That this subsection shall not confer a right of action on any copyright owner or any assignee of such owner with respect to any copyrighted work prepared by a person while in the employment or service of the United States, where the copyrighted work was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used: *And provided further*, That before such action against the United States has been instituted the appropriate corporation owned or controlled by the United States or the head of the appropriate department or agency of the Government, as the case may be, is authorized to enter into an agreement with the copyright owner in full settlement and compromise for the damages accruing to him by reason of such infringement and to settle the claim administratively out of available appropriations.

Except as otherwise provided by law, no recovery shall be had for any infringement of a copyright covered by this subsection committed more than three years prior to the filing of the complaint or counterclaim for infringement in the action, except that the period between the date of receipt of a written claim for compensation by the department or agency of the Government or corporation owned or controlled by the United States, as the case may be, having authority to settle such claim and the date of mailing by the Government of a notice to the claimant that his claim has been denied shall not be counted as a part of the three years, unless suit is brought before the last-mentioned date.

3. Section 1(a) of the Copyright Law, 17 U.S.C. §1(a), provides:

"§1. EXCLUSIVE RIGHTS AS TO COPYRIGHTED WORKS. Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

a) To print, reprint, publish, copy, and vend the copyrighted work;"

4. Section 3 of the Copyright Law, 17 U.S.C. §3, provides in pertinent part:

"§3. PROTECTION OF COMPONENT PARTS OF WORK COPYRIGHTED; COMPOSITE WORKS OR PERIODICALS. The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted, ***. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title."

STATEMENT OF THE CASE

1. *Introduction.* This action seeks reasonable compensation from the Government for copyright infringement. The action is brought under 28 U.S.C. §1498(b), which provides for such compensation as petitioner's exclusive remedy. Accordingly, injunctive relief is neither sought nor possible.

Petitioner challenges respondent's systematic reproduction and distribution, without payment, of complete articles from petitioner's copyrighted journals. This reproduction is accomplished through a system of photocopying journal articles of petitioner and others. The system is an integral part of the operations of the Government's National Institutes of Health and National Library of Medicine, under which millions of pages are copied each year.

The Trial Judge found for petitioner on the issue of liability, with the amount of reasonable compensation reserved for later determination. The Court of Claims, in a 4-3 decision, found the Government's system of reproduction to constitute "fair use," rejected its Trial Judge's decision and dismissed the petition.

The majority below concluded that "on this record, the chal-

lenged use should be designated 'fair', not 'unfair'." (Pet. App. 14.) One of the three dissenting judges viewed the majority decision as one that would "encourage unrestricted piracy. However hedged, the decision will be read, that a copyright holder has no rights a library is bound to respect". (Pet. App. 69.)

2. *Petitioner and its Journals.* Petitioner is a relatively small medical and scientific publisher. (Finding 2,[2] Pet. App. 71.) Its journals, though highly respected (*e.g.*, F-9(a), Pet. App. 76-77), have a limited number of subscriptions. (F-7, Pet. App. 76.) The function of petitioner as a publisher of medical and scientific journals and books is to determine what is needed to advance knowledge in the field of medicine; analyze who is qualified to write on those subjects; edit their manuscripts; and produce and market the finished product. (F-9(a), Pet. App. 76.) Petitioner's activities, along with those of respondent and others, contribute to research and education on the diseases of man and the furthering of public health that results from the dissemination of medical information. (Transcript of Testimony,[3] pages 263, 489.)

Most of petitioner's journals are published in conjunction with nonprofit medical and scientific societies, which receive from 50% to 90% of net profits, if any (F-9(b), Pet. App. 77), with petitioner bearing the risks of loss (*e.g.*, Deft. Ex. 3, par. 8). Four journals are directly involved in this action, three of which have for many years been published in conjunction with such societies. The facts concerning these four journals (F-5(a),

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[2] The findings of fact of the majority below will hereinafter be referred to as "F—". The findings of the Trial Judge are set forth in the Single Appendix filed pursuant to Rule 36, pages in which are hereinafter referred to as "A.—".

[3] Pages in the transcript of testimony are hereinafter referred to as "Tr.—". Since most of the facts are not in dispute, the parties, guided by the policy of Rule 36, have reduced the printed Single Appendix to a minimum. Accordingly, portions of the transcript and certain other parts of the record to which reference is made have not been printed.

Pet. App. 73; F-7, Pet. App. 76) may be summarized in the following table.

Journal	Society	First Published by Petitioner With Society	1969 Approx. No. of Subscriptions	1969 Price
Medicine	—	—	5,400	$12
Pharmacological Reviews	American Society of Pharmacology and Experimental Therapeutics	1909	3,100	$15
Journal of Immunology	American Association of Immunologists	1920	4,700	$22 (society members) $44 (non-members)
Gastroenterology	American Gastroenterological Association	1946	7,000	$12.50 (society members) $25 (non-members)

These four journals are among the leading publications in their respective fields. For example, *Gastroenterology* is considered the outstanding journal in its specialty in the United States and probably in the world (F-9(a), Pet. App. 77).

In addition to subscriptions, petitioner established a licensing program to obtain income from various uses of its medical journals. (F-36, Pet. App. 92–93.) These include:

(i) Licensing reproduction of articles as part of a new book, particularly for use by educational institutions.

(ii) Licensing reproduction, for a payment, of multiple copies by Government agencies and others.

(iii) Sale of microfilm editions.

(iv) Authorization of reprint houses.

(v) A royalty-bearing license to the Institute of Scientific Information to provide requesters with "single copies," *i.e.*, copies of articles, one at a time, for each user. (Tr. 42-43, 127.)

(vi) Licenses to libraries, including Government libraries, to make single copies for users at 5 cents per page.[4]

The effect of unauthorized photocopying cannot be measured exactly in dollars and cents. (Tr. 72-73). In fact, it is not even clear that anybody could determine whether any particular instances of photocopying would or would not result in the loss of a particular form of revenue by a publisher, such as petitioner (Tr. 1107).

Eight articles from petitioner's four journals described above were among the many systematically copied by respondent. Infringement of copyright in these articles was asserted in the petition in the Court of Claims (A. 4–9, 11, 21–23) in an effort to establish the rights of petitioner and other copyright proprietors in this test case.

3. *The Government's Operations.* The National Institutes of Health ("NIH") Library photocopying service employs two Xerox copying machines and two microfilm cameras in conjunction with a Xerox Copyflo printer to provide the 12,000 NIH employees with permanent copies of journal articles. (F-15, Pet. App. 80.) Four employees operate this equipment and filled over 85,000 requests for photocopies of journal articles in fiscal year 1970, representing the photocopying of almost 1,000,000 pages. (*Id.*) In that year, its photocopying budget

[4] The majority below referred to a licensing plan developed by petitioner since the trial. (Pet. App. 24). This plan would offer libraries a blanket license to furnish any or all of their users with single copies of petitioner's articles, upon payment of a single additional fee along with the subscription price and without the need for any reporting or bookkeeping. See p. 37, n. 26, *infra*.

was $86,000. (F-15, Pet. App. 80.) Slightly less than this, *i.e.*, $85,000, was spent in the same year for the purchase of journal materials. (F-13, Pet. App. 79.)

The National Library of Medicine ("NLM") stands at the apex of a national network of libraries, including 10 regional medical libraries and approximately 400 libraries throughout the country. (Tr. 456, 490.) NLM is a library furnishing material free of charge to other libraries and institutions throughout the United States, giving the same service to commercial interests as it does to medical schools, hospitals, foundations and government institutions. Requests by commercial companies, particularly drug companies, account for about 12% of NLM's services. (F-21(a), Pet. App. 84.)

This free service of NLM is referred to as "interlibrary loans" —a euphemism as applied to journal articles which are photocopied and never returned. (*Id.*) In the case of journals as distinguished from books, NLM (rather than the user) has decided to furnish reproductions of desired articles, on a no-return basis, instead of lending the original. (A.30.)

NLM also uses a microfilm with a Xerox Copyflo printer. It utilizes mobile 35 mm. cameras which have an electrical power line overhead so that they move up and down the aisles of the library to film material which is brought to the end of the stack range (F-21(b), Pet. App. 84).

As a result of NLM's comprehensive system of "loaning" journals by permanently furnishing photocopies of journal articles, NLM filled more than 120,000 requests, representing approximately 1.2 million pages of photocopies in fiscal 1968. (F-21(b), Pet. App. 84.)

Photocopies of petitioner's journal articles are generally made by NIH and NLM for users engaged in medical or scientific research or treatment, and the copies of the articles here involved were made for, and furnished to, such persons who used them in their work. (Pet. App. 14.)

In performing its photocopying, the Government leases its copying machines from Xerox Corporation, which it pays according to the number of pages photocopied (F-15, Pet. App. 80).

NLM's photocopying service is enhanced by its publication and sale of a current index of medical literature called *Index Medicus*, which is a compilation of citations to about 2,400 leading biomedical journals (F-20(c), Pet. App. 83), including petitioner's. NLM thus advertises to the medical and scientific community which constitutes petitioner's market that certain articles are available free of charge in the form of a photocopy. (Chief Judge Cowen's dissenting opinion, Pet. App. 41.)

There has been prepared for NLM a graphic image system which allows for the microfilming, storage and retrieval of journal articles, such as those published by petitioner, for the purpose of automated preparation of enlargement prints. (Tr. 814–15.)

The Government, through the General Services Administration, advised users of its 55,000 copying machines in 1966 (operated at an annual cost then estimated at $80 million dollars) as follows:

> "[T]he current widespread use of copying machines . . . is beginning seriously to affect the sale of published works, such as magazines, textbooks, and technical papers . . .
>
> "Because the copier has made it easy to reproduce published works, extra precaution is necessary. Where a notice of copyright is shown, either on the work itself or by general statement in the publication, the law is clear: it may not be copied unless permission of the publisher or author is obtained." (Pl. Ex. 32, Foreword and P. 6, Tr. 198).

The NIH Library and NLM have stated policies which provide for limitations on the nature and extent of their copying of copyrighted and other materials. (*e.g.*, Deft. Ex. 15, 16.) These include the making of only a single copy for each user at one time, and the length and number of articles from one issue. Some

of these limitations are routinely waived (F-17(a), Pet. App. 81); others are difficult, or impossible, to enforce. (Pet. App. 34).

Works classified as "monographs," rather than journal articles, are not photocopied at NIH, even to the extent of a short chapter, without permission of the copyright proprietor. (Tr. 172, 1256, 1263). Moreover, the policy of the Library of Congress is that "copyright material will ordinarily not be copied without the signed authorization of the copyright owner." (Pl. Ex. 46, Tr. 774).

As early as 1957, the then Director of NLM, focusing on recent journals of wide availability (such as those here involved), stated that free photocopying in the NLM had developed beyond reasonable bounds; that "on the face of it, this is a need which the printing press, not the camera, is designed to fill"; and that "NLM should not run a copying service *per se*." (F-43(b), Pet. App. 102). The photocopying policies of NLM then were substantially similar to those presently followed. (Tr. 835, 830; Pl. Ex. 29, p. 10; Deft. Ex. 71).

Before bringing this lawsuit, petitioner's president went to see the director of NLM in an attempt to discuss a royalty plan for photoduplication. The NLM director stated that he would pay no royalty until a court ordered him to do so. (Tr. 75).

SUMMARY OF ARGUMENT

I. The Constitutional purpose of copyright is to promote knowledge by granting incentives to authors in the form of copyright property. Appropriation of this property by the Government through infringement of copyright is remediable by an award of reasonable compensation under 28 U.S.C. §1498(b). One of the specific reasons Congress passed this statute was to permit recovery from the Government for infringement by photocopying. Such infringement has taken place here by the Government's massive system of photocopying of petitioner's journal articles, enhanced by its publication of a widely dis-

tributed catalogue of material available in the form of free photocopies.

The Government recognizes property rights in hardware by paying Xerox Corporation for each copy. Moreover, the marketplace recognizes petitioner's property by making payments under license to petitioner for reprints, microfilm, and authorized photocopying. The Government, nevertheless, has refused to make any such payments to petitioner for its rights in the material being copied.

This is not merely a case of technical infringement of copyright, as confirmed by the recently announced consortium of libraries which plans to cut back on journal purchases and systematically exchange photocopies. It is a comprehensive system of copying which places the continued viability of privately published scientific journals in grave doubt.

II. The fair use defense developed to permit authors to use portions of earlier material in their own works. This judge-made rule, which advances the Constitutional purpose of copyright, has traditionally been applied to situations in which a new work was being created and where only a reasonable amount of earlier material was taken. There is no sound reason why this defense should be extended to this case which involves massive, naked reproduction of complete journal articles thus permitting the accumulation of free reprints by the group constituting petitioner's potential market. Since the reprints in this situation serve as substitutes for the original, they affect the potential market for petitioner's works and thus should not be excused from payment under the defense of fair use.

III. The eminent domain theory underlying 28 U.S.C. §1498(b) produces a most appropriate vehicle to resolve competing interests: petitioner is entitled only to reasonable compensation for the reproduction of its articles and there is no possibility of an injunction. In other situations involving compelling needs for use of scientific materials not met by voluntary licensing arrangements this "reasonable compensation" remedy is also

available. Alternatively, in this situation, other courts might equitably withhold injunctions and require only monetary compensation.

IV. The majority below used makeweights to support its unjustified extension of the fair use defense to this case. Contrary to the arguments made in its opinion:

1. Although petitioner was not required to show actual harm, the record supports the finding of the Trial Judge that there was such harm.

2. Medical research will be helped, not harmed, by an award of reasonable compensation contributing to the fragile base of financial support of privately published, limited circulation scientific journals.

3. An unjust result cannot be excused on the ground that it is a "holding operation" until Congress acts. Congress has thus far declined to grant a library photocopying exemption, leaving this problem to voluntary licensing arrangements and case by case adjudications in the courts. Voluntary arrangements are thwarted, not enhanced, by a decision refusing to recognize *any* rights in publishers.

4. The purported limitations on photocopying by the Government libraries in question—particularly the single copy per user at one time policy—are illusory and irrelevant.

5. Practices of libraries or others before the advent of current photocopying methods are irrelevant.

6. Foreign statutes show that legislative action is required for special library exemptions.

7. The words "print, reprint, publish and copy" set forth in section 1(a) of the Copyright Law to delineate exclusive rights of the proprietor mean what they say.

ARGUMENT

Introduction

The usual infringement issues in copyright litigation are not present in this case. These troublesome questions are whether a defendant copied from the plaintiff's work or produced his work independently and whether enough was copied to amount to infringement. In this case, the Government admits copying directly from petitioner's journals, by physically producing facsimiles. Such copying reproduced the *entire* articles in question, and the majority below agreed with petitioner that "each article in the journals is protected from infringement to the same extent as the entire issue."[5] (Pet. App. 7, n. 6) It is also conceded that petitioner is the proprietor of record of copyrights covering the journals in question.[6]

As a result of these areas of agreement, it is submitted that petitioner has established a *prima facie* case of infringement of its rights to "copy", "print", "reprint" and "publish" under section 1(a).[7] Thus, unless the Government establishes its defense of fair use, petitioner is entitled to an award of reasonable compensation.

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[5] It is thus agreed that each article must be considered a separate work; therefore, copying an entire article is copying an entire work. This is explicitly required by Section 3 of the statute which provides that "the copyright upon . . . periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title." 17 U.S.C. §3. See Markham v. A. E. Borden Co., 206 F.2d 199 (1st Cir. 1953); King Features Syndicate v. Fleischer, 299 Fed. 533 (2d Cir. 1924); Hedeman Products Corp. v. Tap-Rite Products Corp., 228 F. Supp. 630, 633 (D.N.J. 1964).

[6] In the Court of Claims, notwithstanding petitioner's record ownership, the Government contested petitioner's right to sue which had been resolved in petitioner's favor by the Trial Judge. The majority below stated: "We assume, for the purposes of the case, but without deciding, that plaintiff is the proper copyright owner and entitled to sue here, and we agree with plaintiff that on that assumption, it can sue for infringement of the eight separate articles." [Footnotes omitted] (Pet. App. 7)

[7] The fallacy in the argument that these words do not mean what they say is demonstrated at pages 45–49, *infra*. The statute does not define infringement; it simply provides a range of remedies against anyone who "shall infringe the copyright" in any protected work. 17 U.S.C. §101.

I

THE CONSTITUTIONAL AND STATUTORY POLICIES UNDERLYING COPYRIGHT REQUIRE REASONABLE COMPENSATION TO PETITIONER

The framers of the Constitution furnished Congress with a particular means by which to "promote the Progress of Science . . ." Art. I, Sec. 8, Cl. 8. This was the power to grant a form of property, known as "copyright," as an incentive to authorship.

As recently stated by Chief Justice Burger, for this Court, in *Goldstein v. State of California*, 412 U.S. 546, 555 (1973):

> "The clause thus describes both the objective which Congress may seek and the means to achieve it. The objective is to promote the progress of science and the arts. As employed, the terms 'to promote' are synonymous with the words 'to stimulate,' 'to encourage,' or 'to induce.' To accomplish its purpose, Congress may grant to authors the exclusive right to the fruits of their respective works."

The policy underlying this Constitutional choice of copyright as "the means to achieve" progress was explained by this Court in *Mazer v. Stein*, 347 U.S. 201, 219 (1954):

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards, commensurate with the services rendered".[8]

The present action was brought because constitutionally sanctioned property, granted as a deserved reward, is being appropriated without compensation. This uncompensated tak-

[8] As the means and not the end, rewards to authors and publishers are a "secondary consideration", but are intended as "valuable, enforceable rights." *Id.*

ing will have the undesired result of discouraging creative efforts of authors and their publishers who contribute by making it possible for their authors to reach the public. Far from aiding "the progress of Science," such a result clashes with the letter and spirit of both the Constitution and the Copyright Act.

Because such appropriation is by the Government, petitioner sues under a jurisdictional statute which implements another Constitutional policy—the prohibition in the Fifth Amendment against the taking of private property for public use without just compensation. See H.R. Rep. No. 624, 86th Cong. 1st Sess. 2 (1959). Cf. *Interdent Corp. v. U. S.*, 488 F.2d 1011 (Ct. Cl. 1973).

Congress has expressly provided for suits against the Government for copyright infringement by adding a companion subsection, 28 U.S.C. §1498(b), to the long-established provision covering Government liability for patent infringement. Legislative history, which is often unenlightening, provides a dramatic insight into the applicability of this statute to the present case.

Before Congress passed this enabling statute in 1960, its attention had been called to the increased risks of liability caused by the development of copying machines. The Congressional purpose was twofold: (a) to waive sovereign immunity and make the Government liable for copyright infringement; and (b) to protect Government employees from personal liability for copyright infringement by substituting a remedy of damages against the Government. In commenting on the latter objective, the Secretary of Commerce advised Congress of the fact that "the increasing use of desk photocopying machines in the routine administration of the departments make the possibility of infringement [by Government employees] an ever increasing danger." H.R. Rep. No. 624, 86th Cong. 1st Sess. 5 (1959). Thus, one of the specific purposes for which Congress passed the 1960 statute was to make the Government liable for infringement by photocopying, as is here involved.

If the policy underlying copyright is to survive as a viable incentive to write and to publish, an award of reasonable compensation is essential in this particular case of infringement by

photocopying. The Government has not merely invaded petitioner's rights in some minor or technical sense. Far from being casual or sporadic, the Government's copying operation is wholesale, conducted on a "scale so vast that it dwarfs the output of many small publishing companies." (Chief Judge Cowen dissent, Pet. App. 31)

The Government's operation goes even further. By publishing *Index Medicus*, the Government advertises the availability of its photocopies and solicits "the medical community which constitutes plaintiff's market." (*Id.* at Pet. App. 41) The free service thus offered obviates the need of the users to subscribe, purchase reprints or otherwise contribute to the financial support of the journal.[9]

The result is a "vicious cycle which can only bode ill for medical publishing." (A. 42) This can be described as follows: It is virtually impossible to add to the subscribers to such journals beyond those in the discipline served by the particular journal and those relatively few libraries which choose to serve those disciplines. However, while the number of subscribers remains static, the costs of publication continually increase. At the same time photocopying technology continues to improve, enabling copies to be made more cheaply and efficiently.[10] If subscription prices are raised to cover costs plus a reasonable profit, the point is soon reached where, instead of subscribing, some users of the material will photocopy. And as subscription prices increase the continued improvement of photocopying creates an even greater incentive to photocopy. Thus, raising subscription prices does not solve the problem of providing sufficient income to cover cost because it simply encourages fewer subscriptions and more photocopying. Eventually, there will be so few subscribers and the prices will be so high that the journal will be forced to cease publication.

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[9] Petitioner supports the service provided by *Index Medicus*, as it supports library photocopying, because both disseminate more broadly the articles which petitioner publishes. The question here is simply one of reasonable compensation.

[10] See, for example, Business Week, June 29, 1974, at 92 which describes the latest Xerox copier developments.

The marketplace has recognized petitioner's property rights by making payments for use of its articles in various forms to support the journals over and above subscriptions. Thus, users—such as the individuals and libraries for whom the Government makes photocopies in the present situation—have bought reprints, microfilm, and photocopies where those forms were convenient (F-36, Pet. App. 92–93). This Court has recognized the damage to a copyright proprietor that results when he is deprived of license royalties. In *L. A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100 (1919), plaintiff had a system of licensing his advertising illustrations on an exclusive basis for different localities and time periods. This Court approved the finding by the Circuit Court of Appeals that the plaintiff had there sustained damage which "rested in the injury to his [exclusive license] contract, and in the discouragement of and the tendency to destroy his system of business. To make any accurate proof of actual damages was obviously impossible." 249 U.S. at 103–04.

The Government's refusal of a license from petitioner ignores petitioner's intellectual property rights. This is in contrast to the Government's recognition of the property rights of Xerox Corporation which is paid for each page copied. Thus this lawsuit became necessary to prevent the destruction of petitioner's copyrights and of its business which vitally depends on those rights.

Licensing is important because the Constitutional purpose of copyright seeks to encourage not only the creation of works but their dissemination. Thus, statutory protection for journals is available only if they are published.[11] See *Compendium of Copyright Office Practices* 2.3.1 (as of July 1, 1970). This policy

[11] Protection for certain classes of "unpublished" works is available, but that is because such works are usually disseminated to the public in a form which is technically "unpublished." See, *e.g.*, 37 C.F.R. §202.8. *Cf.* Rosette v. Rainbo Record Manufacturing Corporation, 354 F. Supp. 1183 (S.D.N.Y. 1973). Protection for unpublished journal article manuscripts would be under the common law. It has recently been noted, in a case involving the papers of Lee Harvey Oswald, that 28 U.S.C. §1498(b) does not cover infringement of common law copyright. Porter v. U.S., 473 F.2d 1329 (5th Cir. 1972).

is akin to that under which "the patent laws impose upon the inventor a requirement of disclosure." See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S.—, 40 L. Ed. 2d 315, 325 (May 13, 1974). The economic incentive underlying copyright protection is operative when various media of dissemination, both old and new, are utilized. Compensation is appropriate whether or not use in a medium cuts into income from established forms of exploitation.

In the early part of this century, it had been argued that a novelist should not receive compensation from a motion picture based on his novel on the grounds that motion picture revenues do not detract from the author's income from his novel, but rather, add to such income. See *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 57 (1911). The argument was properly rejected because it missed the point that alternative forms of exploitation in keeping with current technology come within the normal ambit of a copyright owner's rights. This flows from the fact that an expression of intellectual creation, like a chair, a house, or a plot of land, is the subject of a property right.

One no longer need speculate that the future health of private journal publishing is seriously in jeopardy.[12] Petitioner's prediction has become a reality. As early as the trial, NLM offered a glimpse of a graphic image system which allows for storage and automatic retrieval of microfilmed articles for automated preparation of enlargement prints. (Tr. 814–15) Emboldened

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[12] One alternative which has been suggested is government subsidy. However, this concept is unacceptable because it is not desirable to have the government support enterprises which can be supported privately; because government support is subject to political and budgetary considerations which make it undependable; and finally, government payment brings with it government control. If at all possible, the government should not be involved in controlling the dissemination of scientific information. This latter point is referred to by the Trial Judge (A. 35) and is discussed more fully in Project—New Technology and The Law of Copyright: Reprography and Computers, 15 U.C.L.A. L. Rev. 931, 956 (1968)

by the majority decision below, a consortium of libraries—presently Harvard, Yale, Columbia and the New York Public Library, but to be expanded as soon as possible to include other libraries—has recently embarked on "a sweeping and controversial program of combined operations that will entail cutting back purchases of many publications and systematically exchanging photocopies of previously published writings." Although "(t)he early stages of this project are expected to cost $10 million to $15 million," library officials state that there is no plan for the libraries to pay royalties. "They cite a recent United States Court of Claims decision in a case known as Williams & Wilkins, as supporting their position." (New York Times, March 24, 1974, at 59.)

II

THE GOVERNMENT HAS NOT ESTABLISHED THAT ITS MASSIVE SYSTEM OF REPRODUCTION SHOULD BE EXCUSED BY THE DEFENSE OF FAIR USE

The Copyright Act grants to the copyright proprietor, without exception, the "exclusive right . . . to print, reprint, publish, copy and vend the copyrighted work". However, the "individual effort" and "creative activities" to be encouraged by copyright, see *Mazer v. Stein*, *supra*, 347 U.S. at 219, often require reference to another's material. And, in the course of such use, some copying necessarily takes place. The "progress of science", and consequently of mankind, is indeed promoted by this process. For, as has been noted by Prof. Chafee: "The world goes ahead because each of us builds on the work of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself.' " Chafee, Reflections on the Law of Copyright, 45 Col. L. Rev. 503, 511 (1945). Thus, while this kind of copying certainly comes within the literal grant of exclusive rights under the Copyright Act, a judge-made rule of reason has developed to exempt these uses

ot portions of earlier works from constituting copyright infringement. This is the often cited and much misunderstood defense of "fair use".

The majority below purported to use this defense to excuse the Government from liability. It did so by treating the defense as a catch-all empowering a court to apply its moralistic view of what is "fair." Using this subjective standard, it held that "on this record, the challenged use should be designated 'fair,' not 'unfair' ". (Pet. App. 14.) Even if this were the appropriate test, the discussion in Point I demonstrates that recognition of intellectual property, an award of reasonable compensation for its appropriation by the Government, and support of scholarly journals by those who use them by making photocopies, all are "fair," not "unfair."

But in fact, the development of fair use, as suggested above, has been guided by two main limiting factors: (1) the use in question has been part of the interweaving of previously published material into another "writing of an author" and (2) the material so used has been a reasonable portion of the copyrighted work. The latter element is reflected in the apt description of fair use as simply an attempt by the courts "to bring some order out of the confusion surrounding the question of how much can be copied." Note, 14 Notre Dame Lawyer 443, 449 (1939). Both elements are recognized in one of the earliest expressions on the subject in this country, *Folsom v. Marsh*, 9 Fed. Cas. 342 (No. 4901) (C.C.D. Mass. 1841), decided by Mr. Justice Story on Circuit. It is appropriate to examine this case at some length because it is generally considered the source of the fair use doctrine in this country.

Plantiff, a publisher, had there issued a 12-volume compilation of the writings of George Washington, together with biographical and other material written by plaintiff's author. Defendants' two-volume work on the same subject contained a good deal of original material but did take a number of pages from plaintiff's compilation.

The defense of fair use (or, as it was then called, "fair and bona fide abridgment") was specifically raised by defendants in their argument that "an author has a right to quote, select or abstract from another, in the composition of *a work essentially new*". 9 Fed. Cas. at 344. [Emphasis added] A condition of this defense, according to the court, was a showing of "intellectual labor and judgment" by the defendant. *Id.* at 345.

In approaching the problem, Mr. Justice Story noted that ". . . in cases of copyright, it is often exceedingly obvious that the whole substance of one work has been copied from another . . .; whereas in other cases, the identity of the two works in substance, and the question of piracy, often depend upon a nice balance of the comparative use made in one of the materials of the other; the nature, extent, and value of the materials thus used; the objects of each work; . . ." He went on to note that "a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism."

Justice Story then focused on precisely what was taken and for what purposes. He noted that value was more important than quantity and quoted from an English decision to the effect that "when it comes to a question of quantity it must be very vague . . . . It is not only quantity but value, that is always looked to." It is at this point in his opinion that Mr. Justice Story states:

> "In short, we often, *in deciding questions of this sort*, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work." 9 Fed. Cas. at 348 [Emphasis added][13]

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[13] These criteria have been restated through the years, finding recent expression in §107 of S.1361, 93rd Cong., as follows:

(1) the purpose and character of the use;

(cont.)

It is thus apparent that "cases of this sort" involve difficult problems of assessing the quantity and value of the material taken. It is equally clear that the defendants had argued that their use was in a work "essentially new." In a curious foretaste of history, Mr. Justice Story was led to the conclusion of infringement "not without some regret that it may interfere, in some measure, with the very meritorious labors of the defendants, in their great undertaking of a series of works adapted to school libraries." *Id.* at 349.

The present case, of course, does not involve incorporation of materials into a new creation; it rather involves the cumulation of free reprints, produced by xerography, in the collections of the group constituting petitioner's potential market. And, by definition, it does not involve use of a reasonable portion of a copyrighted work; it involves massive, naked reproduction of 30 or 40 page articles in a form which permits their use in place of the original.

It is perhaps for these reasons that the majority below cited no decision supporting its key determinations, finding "hardly any [prior decision] that can even be called close." (Pet. App. 14). The majority avoids the leading decisions involving the defense of fair use because they support the result reached by the Trial Judge and the three judge minority. Brief examination of these cases is warranted to properly place in context the criteria traditionally used by the courts when weighing the applicability of the defense.

To begin with, fair use defenses have been regularly rejected by the courts where an entire, or substantially entire, work has been reproduced.

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(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

In *Wihtol v. Crow*, 309 F. 2d 777 (8th Cir. 1962), a high school choral instructor and church choir director innocently rearranged a copyrighted choral work to make it practicable for his choirs to sing. He then reproduced copies of this new arrangement and performed it once with his high school chorus and on one Sunday with his church choir—all for an educational purpose and without profit. The Court of Appeals for the Eighth Circuit held for plaintiff, finding infringement because defendant copied "all, or substantially all of a copyrighted song" and because such wholesale copying could not conceivably be considered fair use merely because the infringer had an innocent intent.

The more celebrated "Jack Benny" case involved a humorous parody of a melodrama. The defendant there argued that the change in treatment made defendant's version a fair use and presented a number of contentions to support its defense. These included Mr. Benny's "custom" over 25 years to present such parodies and the fact that burlesque of a work is in effect literary criticism. The court held that "there is only a single decisive point in the case: one cannot copy the substance of another's work without infringement of his copyright." *Benny v. Loew's Inc.*, 239 F.2d 532, 537 (9th Cir. 1956), *aff'd by an equally divided Court*, 356 U.S. 43 (1958). *Accord, Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484 (9th Cir. 1937); *Walt Disney Productions v. Air Pirates*, 345 F. Supp. 108 (N.D. Cal. 1972).

Public Affairs Associates, Inc. v. Rickover, 284 F.2d 262 (D.C. Cir. 1960), *judgment vacated*, 369 U.S. 111 (1962), made some helpful distinctions in this area. That case was a declaratory judgment action seeking to establish the right of plaintiff to compile certain speeches by Admiral Rickover on the ground, *inter alia*, of fair use. The Court of Appeals (in an opinion by retired Mr. Justice Reed) recognized the various factors that might come into play "[i]f less than the whole text of the speeches is taken" and held that a decision as to the legal effect of such use was premature. The court held, however, that where verbatim copies of speeches are taken, it was able at the thresh-

old to rule out even the possibility of the defense of fair use. 284 F.2d at 272.[14]

Wihtol and *Benny*, particularly, involved creative additions to earlier copyrighted works. This is why the defense was potentially available; even so, it was rejected because of the substantial amount taken. The defense is raised here to enable the Government to furnish free reprints—there is no creativity, and the whole work is taken, over and over again. This is the "reprint service" referred to by Chief Judge Cowen. (Pet. App. 34).

The dominant themes illustrated above are by no means limited to cases rejecting a fair use defense. For example, in *Rosemont Enterprises v. Random House, Inc.*, 366 F.2d 303 (2d. Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), the court quite properly held that the defense is not restricted to "scholarly works written and prepared for scholarly audiences." The defendant there had used for his biography of Howard Hughes material gleaned from an earlier magazine treatment. The court analyzed the fair use doctrine in terms of material which in its "preparation requires some use of prior materials dealing with the same subject matter," *Id.* at 307, and the public benefit to be derived from a new work using earlier materials, *e.g.*, *Id.* at 307, 308. With regard to the quantum of copying, the court relied on *Benny* and related cases, stating:

> "The fair use privilege is based on the concept of reasonableness and extensive verbatim copying or paraphrasing of material set down by another cannot satisfy that standard." *Id.* at 310.

In the present case, the "verbatim copying" was not merely "extensive"; it was complete. It follows that under *Rosemont*,

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[14] This Court's *per curiam* direction for a more comprehensive record in *Rickover* did not appear to be directed to the fair use issues referred to in the text above.

the Government's massive reproduction system would not even approach the area of fair use.

Thus, the rationale of the precedents in this area, as also discussed in the well-documented dissenting opinion of Chief Judge Cowen, supports petitioner. There is no sound reason to depart from established fair use principles by extending the defense to this case. Petitioner's interest is consistent with the public interest in encouraging the flow of new scientific material.

That the fair use defense should not be extended may also be illustrated by focusing on another criterion of fair use—the competitive effect of the unauthorized use on the *potential* market for the original. Put slightly differently, the courts ask the question: Is the kind of use which has been made capable of serving as a substitute for the original?

In seeking to determine "whether the quoted portions *might be* used as a substitute for the original work," *Shapiro, Bernstein & Co. v. P. F. Collier & Son Co.*, 26 U.S.P.Q. 40, 43 (S.D.N.Y. 1934), [emphasis added], the courts are examining "actual or *potential* consumer demand." NIMMER ON COPYRIGHT at 649 (1973) [emphasis added]. But these inquiries are universally in the context of trying to determine whether sufficient—in terms of quantity and quality—has been taken to constitute infringement. See pages 20–22, *supra*. As noted by Mr. Justice Story, such a determination is often difficult because of the necessity to assess the quality and quantity of that portion which has been copied. Accordingly, as a factor in determining whether a partial copying is fair or unfair, the courts sometimes attempt to evaluate whether the portion taken would be sufficient to serve as a substitute for the original.

Such a determination is completely unnecessary in the present case. There can be no issue as to whether or not the use here can serve as a substitute for the original. It concededly does. The Government takes the position that its libraries furnish users with photocopies in lieu of loaning them the original (*e.g.*, Pl. Ex. 25, Tr. 172). But "one copy of the original material could

not possibly be loaned to as many requesters as the numerous photocopies, the competitive effect of which is much greater". (Chief Judge Cowen dissent, Pet. App. 41).

Even if the reproduction were in lieu of loan, infringement has taken place. "The photocopies are exact duplicates of the original articles; are intended to be, and serve the same purpose of the original articles; and serve to diminish plaintiff's potential market for the original articles since the photocopies are made at the request of, and for the benefit of, the very persons who constitute plaintiff's market." (Trial Judge's opinion, A. 41, incorporated into Chief Judge Cowen's dissent at Pet. App. 54). It is thus useless to speculate as to whether a particular library or doctor would in fact subscribe to the particular issue in question. It is the *ability* of the photocopy to serve as a substitute that establishes the injurious effect on a copyright owner's potential market for his work. This applies whether the market is for the original bound volume, reprints, or authorized licensed copies.

The potential here is inescapable. Indeed, it was conceded by the Government itself as early as 1966, when the General Services Administration stated that "the current widespread use of copying machines . . . is beginning seriously to affect the sale of published works, such as magazines, textbooks, and technical papers . . .." (Pl. Ex. 32, Foreword; Tr. 198)

There is no need to argue the matter by citing different portions of reports or surveys not of record.[15] The consortium of

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[15] For example, the majority's reliance on a 1962 report (GEORGE FRY & Assoc., "Survey of Copyrighted Material Reproduction Practices in Scientific and Technical Fields") not only focuses on a report too early to have statistical significance, but, as noted by Chief Judge Cowen, ignores the situation most resembling the facts in this case. This was the situation of a university library's furnishing "excellent service on its collection" to several corporate research and development centers in the same town. The result, in the library's view, was minimum numbers of journal subscriptions by the (cont.)

libraries referred to at p. 19, *supra*, is already engaged in plans to purchase only one copy of a journal where four or more may have been purchased earlier. Publishers such as petitioner encourage utilization of new technology to foster economic savings. But survival of limited circulation, respected, privately published journals is clearly endangered when one pictures a nationwide consortium with one journal being transmitted on demand in facsimile form by wire or otherwise to hundreds of libraries, without compensation to publishers. Copyright protection is essential to the economic survival of such journals and insuring survival of such journals is the prerequisite to effective dissemination of medical research materials.

III

THE REASONABLE COMPENSATION MANDATE OF THE JURISDICTIONAL STATUTE IS THE APPROPRIATE MEANS OF RESOLVING COMPETING INTERESTS

The House Judiciary Committee Report leading to House passage of a copyright revision bill in 1967 noted that "fundamental questions of social policy" underlie this whole area, stating:

> "The fullest possible use of the multitude of technical devices now available to education should be encouraged. But, bearing in mind that the basic constitutional purpose of granting copyright protection is the advancement of learning, the committee also recognizes that the potential destruction of incentives to authorship presents a serious danger." H.R. Rep. No. 83, 90th Cong. 1st Sess. at 31 (1967).

All agree that convenient access to scientific materials should be encouraged, and all agree that the continued economic health and viability of the journals to which access is sought is a sound

corporations. The report found this situation was "the one clear-cut example disclosed during the survey of dilution of the publishers' circulation market." Fry Report, p. 119. (Pet. App. 39.)

goal. As demonstrated in I and II, *supra*, the fundamental method for promoting the viability of scholarly journals and other copyrighted works is established by the Constitution and the Copyright Law. As a result, petitioner enjoys rights under section 1 of the law which are being infringed by the Government. The remedy devised by Congress in cases such as this—the reasonable compensation mandate of §1498(b)—is a most appropriate context for consideration of the competing interests involved.

This remedy ". . . is based, generally, upon provisions similar to those now existing in Federal law for patents, but with modifications appropriate to the nature of copyright property." H.R. Rep. No. 624, 86th Cong. 1st Sess. 3 (1959).

The provisions pertaining to patents were accurately described by the Department of Justice in the following recent statement:

> "Under this provision, a patentee has no right to exclude or secure an injunction against such use; there is automatically a mandatory license to the government and its contractors. The patentee has a claim for just compensation, however, which may be brought before the Court of Claims. *** The original reason for this statute, and one that retains vitality today, is that *the government retains the right to undertake and carry out work involving the national defense and security, or other such public necessities, without being blocked from doing so by the patent system, although it should pay reasonable compensation for the use of the patented invention.*" [Emphasis added] The Bureau of Nat'l Affairs, 157 Patent, Trademark & Copyright Journal, at D-4 (Dec. 13, 1973).

As recognized by Congress, the Government in both patent and copyright situations must have the right to use the protected work, subject only to the requirement that it pay the proprietor a reasonable compensation. Petitioner submits that

the complete disregard of this approach by the majority of the Court of Claims in its first determination under the copyright reasonable compensation statute frustrates the legislative purpose. *Cf. Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134 (1968). For example, one of the three "core" propositions of the court's opinion is that medical research would be injured by finding for petitioner. The payment of reasonable compensation under 28 U.S.C. §1498(b) could not possibly have such a result, any more than reasonable compensation for the Defense Department's use of an invention would harm national defense.

Petitioner recognizes implications beyond the present case. Indeed, this lawsuit was brought to achieve some legal recognition of the rights of publishers by librarians so that dialogue would be possible with the objective of reasonable financial accommodation on both sides. These efforts have been met with adamance on the part of librarians, a position reinforced by the majority decision below. Reversal would afford a unique opportunity to produce a workable pilot arrangement—continuation of photocopying with the Court of Claims setting compensation which is reasonable under the circumstances. The guidelines thus established would furnish significant assistance to librarians and publishers to cooperatively achieve their common goal.

If publishers in petitioner's position resisted the standards established in this "reasonable compensation" case, or otherwise failed to provide access to their works deemed vital to the interests of science, various alternatives emerge. To begin with, there is the potential pressure of 28 U.S.C. §1498(b) itself: NLM has the option of reproducing any scientific article, directly or through a contractor, in which case the publisher can recover from the Government, but no more than "reasonable compensation." This situation is explicitly recognized by the language of section 1498 itself. The burden of bringing an expensive lawsuit in the Court of Claims is, however, a significant induce-

ment to a publisher to follow reasonable standards contractually.

Judge Nichols has outlined his views on the obstacles to equitable relief, by way of injunction, if such a publisher sues a private library. He quotes (Pet. App. 68) the observations of Mr. Justice Douglas that "[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). The fashioning of appropriate remedies in this area, as a result of the balancing of equities, might make relevant such factors as the availability of authorized copies of the articles in question or the availability of a reasonable licensing plan. If these led the court to withhold an injunction, the infringement might be remedied with appropriate monetary relief. See, *e.g.*, *Edgar H. Wood Associates, Inc. v. Skene*, 347 Mass. 351, 197 N.E. 2d 886, 896 (1964). *Cf. Dun v. Lumbermen's Credit Association*, 209 U.S. 20, 24 (1908); *Foster v. American Machine & Foundry Co.*, 492 F.2d 1317 (2d Cir. 1974), *pet. for certiorari filed*, May 21, 1974, No. 73-1744, (approval of "flexible approach" in patent case denying injunction and providing compensation in form of compulsory license).

This review of the authorities indicates that the majority below not only misconstrued its own duty in this "reasonable compensation" case but conjured up spectres as to other cases (See Pet. App. 25). By exercising its function in this case through an award of reasonable compensation, the Court of Claims would furnish an appropriate model for the fashioning of relief by other courts.[16]

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[16] The fact that judicial procedures for setting reasonable license fees have been under the antitrust laws is not significant; the systems have worked reasonably well. Judicial rate-making for copyright royalties is employed in the consent decree governing the American Society of Composers, Authors and Publishers. See *e.g.*, U.S.A. v. ASCAP, CCH 1940–43 Trade Cases ¶56, 104; 1950–51 *id.* ¶¶62,594, 62,595.

IV

NOTHING IN THE MAJORITY OPINION BELOW JUSTIFIED DENYING COMPENSATION TO PETITIONER UNDER THE DEFENSE OF FAIR USE.

It has been demonstrated above that the principles underlying the fair use defense do not apply to this case and that on these facts there is no reason to extend the doctrine.

It is against this background that we will examine in some detail the proliferation of "factors" and "considerations" which the majority below used to justify its holding. The result, it is submitted, will amply demonstrate that each is an unreliable prop and that the massive system of furnishing reprints operated by respondent is not and should not be fair use.

A. *The Majority's Three "Core" Propositions.*

1. *Harm to Petitioner.* One of the three propositions at the "core" of the court's position (Pet. App. 14) is its view that the petitioner has not shown substantial harm from the specific practices of NIH and NLM which are the subject of this action.[17] We submit that this conclusion is irrelevant and wrong.

(1) The trial of this action was limited to the issue of liability, with the amount of reasonable compensation, if any, reserved for later determination. This is quite common in copyright cases. Accordingly, it was neither necessary nor appropriate for petitioner to seek to establish damages in the traditional sense. As appears at pages 33–35, *infra*, the record on even the liability issue does contain a showing of harm greater than is required generally for copyright liability.[18]

(2) The majority below apparently thought harm was relevant

[17] This proposition is also the basis of the "factor" discussed in Part III, subpart 5, of the court's opinion (Pet. App. 19–23).

[18] The standards required to promote the statutory policy behind copyrights were articulated by this Court in F. W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 233 (1952) where it was recognized that remedies (cont.)

because respondent has raised a defense of fair use. (See Pet. App. 23)[19] As indicated above, this belief is based on an erroneous reading of the criterion of fair use which looks at the competitive effect of the unauthorized use on the potential market for the original. Chief Judge Cowen noted that "although the court states that it rejects the trial determinations as to both actual and potential damage to plaintiff, . . . the opinion shows that the court's conclusion is based primarily on its finding that plaintiff failed to prove actual damages". (Pet. App. 37) Aside from using this incorrect standard, the majority was also in error in rejecting the Trial Judge's findings.

To begin with, the hyper-technical approach of the majority on this point is in sharp contrast with its freewheeling assumptions on other subjects, notably harm to medical science.[20] Moreover, in imposing its strict requirement of proof, the majority rejects the inferences reasonably drawn by the Trial Judge from the facts and circumstances in evidence which, according to the Court of Claims rules are "presumed to be correct". See *Bonnar v. United States*, 438 F.2d 540, 542 (Ct. Cl. 1971). As stated in the dissenting opinion of Judge Nichols, the court below "would have had difficulty reaching the conclusion

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are available under the statute "[e]ven for uninjurious and unprofitable invasions of copyright." This standard has been applied by the courts through the years. See, *e.g.*, Hedeman Products Corp. v. Tap-Rite Products Corp., 228 F. Supp. 630, 635 (D.N.J. 1964); National Council of Young Israel, Inc. v. Feit Co., 347 F. Supp. 1293 (S.D.N.Y. 1972).

[19] It has been shown above that the contexts in which fair use criteria have been applied differ markedly from the present one and that no court before had extended the defense to a wholesale system of furnishing reprints.

[20] Nimmer, in commenting on the decision below, has noted this shift in perspective when the court weighs injury to petitioner "by reason of 'these specific practices of NIH and NLM,' while the counterbalancing interest under the second 'proposition' is not just that of NIH and NLM but medicine and medical research in general. This is like balancing the interest of a particular author in his novel against the public's interest in literature generally. With the scales thus tipped, the balance must be against the copyright." NIMMER ON COPYRIGHT, §145, at 656.1 (1974). A proper balance requires viewing petitioner as representing not only its individual interest but reflecting, rather, the interests of authors, university presses, profit and nonprofit scholarly publishers and the creative and publishing comunities in general.

it did, if it had respected the findings as it should have done." (Pet. App. 71.)

The Trial Judge's inference of damage was clearly warranted and followed the pattern of damage determinations in copyright cases. For example, in *Blumcraft of Pittsburgh* v. *Newman Bros. Inc.*, 337 F.Supp. 859, 863 (S.D. Ohio 1971) the court stated:

> "There is absolutely no direct proof at all of any actual damage to the plaintiff. For instance, there is no direct proof that any architect or any contractor, as a result of the infringement, became a party to a substitution of the defendant's product for the plaintiff's product. Concededly, such proof would be difficult to obtain. On the other hand, it is not difficult for a fact finder to infer from the actions of the parties to this case, as we do, that some damage, did in fact result from the infringement . . . . This is not unusual in copyright cases."

(3) Over and above the foregoing, the record actually does contain a number of specific evidentiary facts supporting the Trial Judge's findings that "damage may be inferred in this case from the fact that the photocopies are intended to supplant the original articles." (A. 42). These include the following:

> (i) The admission of the NLM Director that the consequences of extensive photocopying services may well be that researchers find it necessary to request fewer reprints of articles. (Tr. 503).
>
> (ii) Large-scale photocopying by libraries not only has a potentially harmful effect on the sales of reprints and back volumes, but it also eliminates the possibility of receiving royalties from photocopying actually licensed by petitioner (Pet. App. 94; Tr. 72-74).[21]
>
> (iii) In the opinion of some scientists and medical journal

[21] The majority's labelling the loss of royalties as a "wrong" measure of the detriment to petitioner (Pet. App. 20, n. 19) is refuted by both logic and authority, as has been noted at pages 17–18, *supra*.

editors, photocopying potentially limits the growth of new journals with the unfortunate effect of limiting the dissemination of medical knowledge (Tr. 986-87, 436).

(iv) Although the damage inflicted by photocopying on petitioner cannot be measured exactly in dollars (Tr. 72-73), at least some subscribers cancel subscriptions because photocopying is cheaper. (Pl. Ex. 34.) The question of how many have refrained from subscribing is even more important and less susceptible of proof. However, photocopying is considered by petitioner as one of the reasons why certain of its journals have failed (Tr. 1301-02).[22]

(4) The majority's analysis of the record in this case on the point of damage begins by noting that the Government "made a thorough effort to try to ascertain, so far as possible, the effect of photoduplication on plaintiff's business, including the presentation of an expert witness." (Pet. App. 20).

There is no need to set forth in detail the many inconsistencies and inadequacies of the Government's effort.[23] The total failure of this effort is demonstrated without more by the concessions of the Government's expert that: (i) he had not addressed himself explicitly to any question relating to the photocopying of petitioner's journals (Tr. 1032-33); (ii) in particular, he did not identify in any way, or attempt to measure in any way, the photocopying of petitioner's journals (Tr. 1034); and (iii) he made no attempt to identify specific indicia within the journal publishing field that might be more precise and germane to the economic health of a journal publisher than the indicia he used such as gross national product (Tr. 1072-1073).

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[22] Petitioner's officers are not disqualified from offering their judgment in this matter; such judgment is entitled to as much weight as that of "experts" having no experience in publishing (Tr. 933). Cf. Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354 (9th Cir. 1947).

[23] For example, the expert took no account of the steps taken by petitioner to mitigate the potentially harmful economic effects of photocopying (Tr. 1138–39). And if measurement of subscription growths were relevant, it is noted that two of the journals actually lost subscribers from 1968 to 1969 (F-39(a), Pet. App. 93–94).

The Government's economic expert's testimony indicates the difficulty of proving actual harm. In the course of his testimony, he had noted the data which had been unavailable to him, thereby preventing his focusing on the question of photocopying and its effects on petitioner. He was then asked hypothetically about his ability to form an expert opinion on this subject *even if* he had all the data that he needed. He conceded that even if he had all relevant data on the extent of photocopying, he still could not determine *whether or not* petitioner lost any revenues which otherwise might have been received had it not been for photocopying (Tr. 1098–1101, 1102, 1103). Moreover, his testimony leaves it doubtful whether anybody could tell whether any particular instance or instances of photocopying would or would not result in the loss of a particular form of revenue by a publisher such as petitioner regardless of what data was available (Tr. 1107).

Thus, the quest for proving or disproving actual harm at this juncture is unrealistic and illusory. The difficulties in proving actual damages in copyright cases generally have been widely noted. See cases cited at p. 31, *supra*, n. 18.

2. *Effect on Medical Research.* The second "core" proposition[24] for the majority's opinion is its view that awarding petitioner reasonable compensation will stop photocopying and thus harm medical research. Chief Judge Cowen and Judge Nichols both demonstrate that an award of reasonable compensation here would not stop photocopying (Pet. App. 42–43; 67). Such a result cannot possibly occur in this lawsuit nor, as indicated at p. 30, *supra*, can one expect another court to issue injunctions lightly in this context.

In terms of extra-judicial consequences, the evidence does not support the fear that the payment of reasonable royalties would cause photocopying to be stopped. On the other hand, the record does show the following:

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[24] This proposition is also the subject of Part III, sub-part 4, of the majority opinion (Pet. App. 19).

(i) Some scientific works are classified as "monographs" rather than "periodicals", although librarians sometimes differ as to the criteria for such classification. (Tr. 649). As a general rule, the Government refrains from photocopying even as much as a short chapter from a monograph without permission of the copyright owner (F-18, Pet. App. 81). (This is to be contrasted with petitioner's interest, not in stopping photocopying of journals, but merely in receiving reasonable royalties.) The Government offered no proof that its self-imposed prohibition against copying chapters of monographs has been harmful, and it is to be presumed that medical research has proceeded apace nevertheless.

(ii) There is testimony by the Chief Librarian at NIH that the payment of royalties to publishers for obtaining photocopies would neither thwart nor hinder the performance of the mission of the NIH library, since such payment is a "side issue", involving economic and budgetary considerations and is not "a service oriented kind of thing." (Pet. App. 43; Tr. 174–75). The royalties requested by the petitioner, even before its blanket license program, were conceded by the NLM Director to be "a very small sum—surprisingly small sum". (F-40(b), Pet. App. 95). Moreover, libraries are quite capable of meeting the cataloging problems involved in sorting out the respective publishers entitled to payment.[25]

(iii) The fact that the Government has made no studies as to administrative costs of a royalty system (F-40(a), Pet. App. 95), itself refutes the majority's conclusion that photocopying would have to be stopped if petitioner prevails. The only administrative costs involved in a royalty system would be essentially allocated portions of salaries (Tr. 634–640). There is no basis for the inference that such amounts would cause a halt to photocopying. (While neither NIH Library nor NLM charge users for the making

[25] For example, NLM encountered no difficulty in identifying articles from petitioner's journals being photocopied when it made the effort (See F-40(b), Pet. App. 95).

of photocopies, other libraries including regional medical libraries operating in conjunction with NLM do charge users for each page of copying. Tr. 912.) Petitioner has made it clear that it prefers automatic blanket licensing without any need for record-keeping.[26] At the trial it was conceded by Government witnesses that a system involving a blanket license could probably be administered simply by way of a spot-check or by a survey as to the amount of copying provided (Tr. 518, 648, 797).

Even if it were burdensome for the Government to comply with an award for reasonable compensation (which it clearly is not), the Government conceded below that the petitioner's right to recover cannot be defeated by administrative costs and inconveniences. (Deft. Brief in Court of Claims p. 65, n. 1).

It has been demonstrated in Point I above that medical research, rather than being harmed, would be benefited by a system of reasonable compensation.

3. *Only a "Holding Operation."* The third "core" proposition is hardly a proposition at all; it seems rather an extraordinary expression of doubt by the majority that its decision is correct. The court states that the problem of accommodating the competing interests of the parties calls for legislative action and that until such action, the court should not place a risk of harm on science. This makeweight becomes even more bizarre at the close of the court's opinion where the hope is expressed that "the result in the present case will be but a 'holding operation' in

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[26] Petitioner's alternative of a blanket licensing system referred to by the majority (Pet. App. 24) would cost libraries supplying only their own patrons with photocopies, such as NIH, an average of $3.65 per year for each of petitioner's journals, payable along with the subscriptions. Regional libraries making reproductions for other libraries and NLM, at the apex of a massive national network, would pay proportionally more. These sums may properly be described as "a surprisingly small sum" (F-40(b), Pet. App. 95, 43) from the point of view of a particular library, but they are crucial in the aggregate to a publisher trying to keep scientific journals viable. See HEARINGS ON S. 1361 BEFORE THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 93RD CONGRESS, 1ST SESS. (1973) at pp. 157 and 158.

the interim period before Congress enacts its preferred solution." (Pet. App. 29).

It would seem that this hope, along with the majority's "solid doubt" as to whether "copy" means "copy," discussed below, are weak reeds on which the Court's faulty fair-use analysis leans. Moreover, the history of attempts towards interim solutions and Congressional action demonstrates that the majority's decision, if allowed to stand, will actually block any successful resolution of this issue. Congress has thus far shown a distinct disinclination to act in this area and has suggested voluntary licensing arrangements. See, *e.g.*, H.R. Rep. No. 83, 90th Cong. 1st Sess. 32–33 (1967).[27] The decision reached by the majority below will, as indicated above, merely reinforce adamance on the part of librarians which will block any voluntary arrangement or satisfactory Congressional compromise.

The "holding operation" philosophy also places this pressing problem in an "Alfonse & Gaston" posture. To emphasize the need for Congressional treatment is one thing; to postulate a decision on this basis, even in part, is, it is submitted, virtually an abdication of the judicial function. Moreover, this approach conflicts directly with the legislative exhortation by the House Judiciary Committee that the "courts must be free to adapt the [fair use] doctrine to particular situations on a case-by-case basis;" for this reason the Committee (and presumably the House of Representatives in approving the only copyright revision bill passed by either house in the current effort) had "no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change." It also stated, in fact, that it does not favor a specific provision dealing with library

[27] On July 3, 1974, the Senate Judiciary Committee reported out the most recent version in the ten year succession of copyright revision bills, an amended S. 1361, 93rd. Cong., 2d Sess. A limited library exemption as to single copies of journal articles is proposed under certain conditions (§108(d)) but is inapplicable, *inter alia*, to "systematic reproduction or distribution" (§108(g)). See SEN. REP. No. 93-983 93rd CONG. 2d SESS. 122 (1974). Thus even under this proposed bill, which has not yet been acted upon by either house, the courts would continue to test library photocopying against general fair use principles. See §108(f)(3).

photocopying and that this subject "like everything else, must be judged a fair use or an infringement on the basis of all the applicable criteria and the facts of the particular case." H.R. Rep. No. 83, 90th Cong. 1st Sess. 32, 36 (1967). The majority below quotes and then ignores this precise language in its opinion (Pet. App. 26, n. 28). Petitioner, and authors and publishers generally, are thus caught in a never-ending "holding operation" devised by the majority of the Court of Claims.

B. The Majority's Other "Factors"

(1) The majority judges "start by emphasizing" the non-profit character of the government libraries and the scholarly purpose for which the copies were made. (Pet. App. 14). With respect to the former, it is clear that *every* use by the Government is in effect "non-profit"; and, of course, the medical societies in conjunction with whom petitioner publishes journals are non-profit as well. If this factor were to be determinative or, indeed, even significant, there would be no cases possible against the Government for copyright infringement. Yet, in 1960, with full awareness of the risks of liability through photocopying, Congress gave the Court of Claims exclusive jurisdiction to hear such cases. See p. 15, *supra*. And, it should be noted that Congress has distinguished in the Copyright Act between certain rights which are infringed only by a use which is "for profit" (*e.g.*, public performance of music and of non-dramatic literary works covered by §1(e) and 1(c) of the Statute) and other rights under Section 1(a), such as those involved here, which have no such limitation.

Petitioner agrees that the medical researchers for whom respondent made photocopies used the articles to assist them in their medical research or treatment. But these are the very same people petitioner seeks to serve by its publishing activities and for the very same purposes. It is thus meaningless to belabor the point that the purpose of photocopying was scholarly, inasmuch as every use made of petitioner's works can be so classified. In any event, the Government is no more entitled to appropriate petitioner's property without payment than it would be to similarly seize medicines from private pharma-

ceutical companies for use by NIH in its nonprofit and scientific endeavors.

(2) The majority argues that in furnishing millions of pages of photocopies of complete articles to all users who wish them, the Government's libraries "keep the duplication within appropriate confines." (Pet. App. 15.) This has resulted, it is argued, from "reasonably strict limitations". These appear to focus on restriction of copying for each request to a "single copy of a single article of a journal issue, and to articles of less than 50 pages." (*Id.*) The article length "limitation" is not only irrelevant (because each article, regardless of length, stands on its own feet as a copyrighted work. See p. 13, n. 5, *supra*) but is ignored so routinely as to be meaningless. (*E.g.*, F-17(a), Pet. App. 81). Accordingly, we will focus on the "single copy" limitation.

To begin with, the copyright law has never considered the number of unauthorized copies made at one time a determinant as to whether infringement has taken place. As stated by the Trial Judge, "there is nothing in the copyright statute or the case law to distinguish, in principle, the making of a single copy of a copyrighted work from the making of multiple copies." (A. 39) See, *e.g.*, *Shapiro, Bernstein & Co. v. 4636 S. Vermont Ave., Inc.*, 367 F.2d 236 (9th Cir. 1966). *Cf. Chappell & Co., Ltd. v. Columbia Graphophone Co.*, [1914] 2 Chancery Div. 745; *Associated Music Publishers, Inc. v. Debs Memorial Radio Fund*, 141 F.2d 852 (2d Cir. 1944); *Chappell & Co. v. Middletown Farmers Market*, 334 F.2d 303 (3rd Cir. 1964).

Indeed, this Court has noted a Congressional policy for damages "even for the circulation of a single copy." *Douglas* v. *Cunningham*, 294 U.S. 207, 210 (1935).

Indicative of the importance of even a single copy in the electronic era is *Walt Disney Productions* v. *Alaska Television Network, Inc.*, 310 F. Supp. 1073 (W.D. Wash. 1969). It there appears that one unauthorized videotape of a television broadcast was made and later transmitted over cable television. The court found liability without, however, specifically mentioning the "single copy" point. This case reminds one that a

"single copy" of a journal might some day be stationed in a single location, with images of articles transmitted electronically on demand nationwide. One "single copy" so transmitted would be an infringement as are the "single copies" being furnished here.

When one analyzes the service offered by a library, it becomes apparent that one is not talking about a single copy at all. Petitioner would not have sued for the making of a truly single copy. Here, however, the result of a multiplication of single copies is a multitude of copies even though they are furnished one at a time to individual scientists. As stated by the House Judiciary Committee, "[i]solated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented." H. R. Rep. 83, 90th Cong. 1st Sess. 35 (1967).[28]

The supposed magic of the single copy limitation is destroyed by evidence of what actually takes place at NIH Library and at NLM. For example:

> (i) Each library has no way to enforce its stated one-copy-per-user limitation inasmuch as there is no procedure to check whether the same user has requested a copy earlier. (F-17 (b), Pet. App. 81). The Government's own witness testified that he has reordered copies of the same article. (Tr. 1355). Indeed there are at least four instances in the record of the same individual's having ordered two copies of the same article on the same day (Pl. Ex. 11-A, pp. 25, 30, 31 and 34).[29]

[28] Professor Nimmer has aptly noted that "there would appear to be a qualitative difference between each individual scholar performing the task of reproduction for himself, and a library or other institution performing the task on a wholesale basis for all scholars. If the latter is fair use, then must not the same be said for a non-profit publishing house that distributes to scholars unauthorized copies of scientific and educational works on a national or international basis?" NIMMER ON COPYRIGHT 654 (1973). It has been conceded here that more people secure photocopies from NIH than would copy substantial portions of articles by hand (F-17(b), Pet. App. 81).

[29] This is the "duplication" referred to by the majority (Pet. App. 15, n. 14). Duplication of copies of the same article for different users is, of course, much greater. See page 42 (ii), *supra*.

(ii) Each library will frequently furnish simultaneously two copies of the same article to different users. This process can go on indefinitely since NLM will furnish any number of libraries with copies of the same article (F-22(a), Pet. App. 85) and the record shows numerous cases where different individuals have in fact ordered copies of the same articles. (Presumably every other nonprofit library in the country can engage in the same never-ending, one-at-a time reproduction.)

(iii) The works alleged in Counts III, IV, V, and VI of the Court of Claims Petition were all copied from the same issue of the same periodical for the same user on the same day (Pl. Ex. 11-A, pp. 2, 3).

These examples can be supplemented to demonstrate that the concept of a single copy limitation in library photocopying is an illusion.

(3) The majority talks about library photocopying practices (Pet. App. 17–19) but in so doing it emphasizes ambiguous practices in eras before modern photocopying was developed. The majority concedes that "the proliferation of inexpensive and improved copying machines, less than two decades ago led to the surge in such duplication" (Pet. App. 18); that early library photocopying was "not of course to the extent of the modern development" (Pet. App. 17); and that there have been "considerable changes in the ease and extent of such reproduction" (Pet. App. 18). In the same vein, the majority points to alleged practices of the Library of Congress in 1909, largely ignoring the practices of the Library in effect "currently, and for some time," (Pet. App. 17, n. 16) under which the Library ordinarily will not photocopy copyrighted material without the authorization of the copyright owner. The latter were introduced into evidence (F-44, Pet. App. 103); the former were not. In any event, the irrelevance of earlier practices was underlined by the concession of the Government below that in 1958 "there was virtually no photocopying as presently practiced . . ." (Defendant's Brief in Court of Claims at 46).

It is equally clear that modern photocopying has not been "carried on with apparent general acceptance." Neither petitioner (F-41(c), Pet. App. 98) nor authors and publishers in general have ever acquiesced in the photocopying (*e.g.*, Tr. 433). In any event, recent photocopying has always operated under a cloud. This was, as pointed out at p. 10, *supra*, recognized by the NLM director, who stated that the issue would have to be resolved by the courts (F-43(a), Pet. App. 101.)[20]

The legislative history of the National Library of Medicine Act, 42 U.S.C. Section 275 and the Medical Library Assistance Act of 1965, 42 U.S.C. Section 280b-1 et seq. sheds no light on this subject. Indeed, in connection with these statutes, the Register of Copyrights noted in 1965 that they were not "in any way in derogation of the rights granted under the Copyright Law to the proprietor of the copyright." (Finding 43(a), Pet. App. 102.) An indication of what those rights were assumed to be can be gained from the unsuccessful effort of the Department of Health, Education and Welfare in the same year to secure express sanction for the acts complained of in this action. Hearings on H.R. 4347 and other bills before Subcomm. No. 3 of the House Judiciary Comm., 89th Congress, 1st Sess. 1133 (1965).

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[20] No help can be gained from the so-called "gentleman's agreement". (F-41, Pet. App. 95–96) This document was written in the 1930's when "photocopying" required darkroom facilities or other delays and expenses involved with photostats and the like; the wet and/or odoriferous processes that followed also bore little resemblance to the rapid and convenient manner of producing photocopies today—for the first time at prices cheaper than printing. In any event, the "gentleman's agreement" seems to resemble "the emperor's new clothes". It speaks simply of making a photocopy "of a part" of a copyrighted work, but does not define the word "part", as the majority assumes, so as to permit the photocopying of an entire journal article. Little thought was given to periodicals, a fact undoubtedly explained by the absence of periodical publishers from the groups identified with the "gentleman's agreement." Finally, the "gentleman's agreement" speaks in terms of an "exemption from liability" and states that "legally, no individual or institution can reproduce by photography or photomechanical means, mimeograph or other methods of reproduction, a page or any part of a book without the written permission of the owner of the copyright".

Indeed, more recent Congressional action and inaction discussed by the majority (Pet. App. 23–27) in no way supports its conclusion. The majority argues that Congress had not been explicit in extending Section 1 protection to photocopying (Pet. App. 23). What really has happened, however, is that §1 rights, as a matter of language and common sense, fit reproduction through photocopying, and Congress has simply declined thus far to grant a special exemption to libraries for this kind of activity.

The situation is thus parallel to that examined in *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 5 F.2d 411, 412 (6th Cir.), *cert. denied*, 269 U.S. 556 (1925), which held radio broadcasting a public performance for profit. The court there stated:

> "Bills have been introduced in both House and Senate to permit broadcasting without infringing copyrights. The rights of composer, producer, performer, and the public under the new method of reproduction are eminently matters for considered legislation; but, until Congress shall have specifically determined the relative rights of the parties, we can but decide whether and to what extent statutes covering the subject-matter generally, but enacted without anticipation of such radical changes in the method of reproduction, are, fairly construed, applicable to the new situation."

(4) The majority's reliance on what foreign legislatures have chosen to do is misplaced. That discussion merely serves to demonstrate the following: (a) When a special exemption from normal liability of the copyright law is desired, a statute is required. (b) The United States statutory law is markedly different from foreign statutory law in a number of other matters even more central to the question of copyright, *e.g.*, formalities such as notice and registration, renewal and manufacturing clause. See 17 U.S.C. Sections 10, 13, 16, and 24. (c) The majority is even in error when it suggests that the photocopying activities of NLM and NIH would, in fact, be sanctioned by the statutes cited in its opinion (Pet. App. 27). To demonstrate this in

detail would merely illustrate how far afield is the use of foreign statutes in attempting to apply the provisions of our statute. But even the first statute cited, that of the United Kingdom, would not apply because it permits no more than a single article from a journal to be copied and requires the person requesting the copy to pay the cost. *See* United Kingdom Copyright Statute of 1956, 4 & 5 Eliz. 2 c. 74, §7 ((d) and (e)). Indeed, the courts of foreign countries give every indication of construing these special exemptions strictly against libraries. See *Masson & Cie, et al. v. Le Centre National de La Recherche Scientifique* (Le Tribunal de Grande Instance de Paris, January 28, 1974); *Moorhouse et ano. v. University of New South Wales*, 624 Austl. 1 (Supreme Court of New South Wales, Equity Division, No. 2505 of 1973, May 24, 1974). These cases show that petitioner is not alone in seeking judicial enforcement of its rights and that its colleagues even in countries with legislative exemptions for libraries have secured relief.

In any event, there is no special legislative library exemption in the United States covering this case.

C. *The Majority's "Solid Doubt" That "Copy" Means "Copy".*

It would not ordinarily be necessary to point out that a "Xerox copy" or other "photocopy" produced by a standard office "copier" is indeed a "copy" within the meaning of Section 1(a) of the Copyright Law. It would seem equally clear that a photocopy produces a "print," just as a photograph does.

The majority below concedes that "photoduplication necessarily involves 'copying' (* * * in dictionary terms)" (Pet. App. 8). But it goes on to argue that to apply the dictionary is to be engaged in a "ministerial lexicographic task." It argues further that:

> "Read with blinders, this language [Section 1(a)] might seem on its surface to be all-comprehensive—especially the term 'copy'—but we are convinced, for several reasons, that

'copy' is not to be taken in its full literal sweep." (Pet. App. 8)

The reasons offered are so ill-founded as to suggest an inordinate need on the part of the majority to buttress with makeweights the "fair use" analysis on which its decision is principally based. It is submitted that to apply plain meaning to ordinary words such as "copy" or "print" is not to read them with blinders;" on the contrary, it is to read them with common sense.[31]

The majority's arguments that not all copying is unlawful or that some unlawful copying goes unprosecuted do not mean that copying has not taken place. If words are to have any meaning, copies were made by the Government in this case. Even under the restrictive approach taken by this Court in another context in *White-Smith Music Co.* v. *Apollo Co.*, 209 U.S. 1 (1908) the Court referred to "the common understanding of [a copy] as a reproduction or duplication of a thing." *Id.* at 17. Regardless of whether or not copying is excused by any number of defenses—such as statute of limitations, absence of copyright notice, or fair use —the "reproduction or duplication" of articles in this case results in "copying."

Equally far-fetched is the notion suggested by some of the Government's *amici* below that legislative history requires the word "copy" to be read out of the statute as pertaining to all books and periodicals. The majority confesses that it is "not ready to accept fully" this proposition, but finds that it provides a "solid doubt" which "must be taken into account" (Pet. App. 9) and produces a "grave uncertainty" which supports its result. (Pet. App. 23.)

Accordingly, one further comment may be warranted. The House Patent Committee in reporting on the 1909 Act notes

[31] The present case involves none of the difficult problems posed in Fortnightly Corp. v. United Artists Television, 392 U.S. 390 (1968) and Teleprompter Corp. v. CBS, Inc. 415 U.S. 394 (1974). In those cases the Court was asked to define the statutory term "perform" more broadly than its conventional meaning, see 392 U.S. at 395, so as to encompass cable television. Here, even the majority below concedes that the ordinary meaning of "copying" covers photocopying.

that language from earlier statutes (which covered printing, publishing, etc.) was adopted in Section 1(a) and that "this, *with the insertion of the word 'copy'* practically adopts the phraseology of the first copyright act Congress ever passed . . ." H.R. Rep. No. 2222, 60th Cong., 2d Sess. 4 (1909). [Emphasis added.] How this specific mention of the addition of the word "copy" creates any "doubt" or "uncertainty" is beyond the imagination. A later reference in the House Report to preserving the old phraseology means, of course, keeping the old language aside from the word "copy" being inserted.

Photoduplication is not only copying, it is printing and reprinting as well. Printing, for copyright purposes, has long been considered to include mimeographing and even typewriting. See *Macmillan v. King*, 223 Fed. 862 (D. Mass. 1914). As stated by the Trial Judge, " 'printing' and 'reprinting' " connote making a duplicate original, whether by printing press or a more modern method of duplication." (A 38–39.)

These generalizations have particular application to this case. For example, the Government's microfilming, followed by duplication through use of a Xerox Copyflo attachment, has been described as follows:

> "The Xerox Copyflo machines can be regarded as plateless printing presses. . . . For example, it is quite feasible to print a single copy or several copies of an entire book either directly from an existing copy or from microfilm" SCHAFFERT, ELECTROPHOTOGRAPHY. 144 (The Focal Press 1965)

As demonstrated throughout the trial record, users of petitioner's journals utilize photocopies in precisely the same way they use reprints and keep them permanently in files of reprints (*e.g.* Tr. 1359).

The exclusive right of "printing" was first granted in 1790, in the first copyright statute enacted by Congress, 1 Stat. 124, and has been in the law ever since. The fact that current modes of xerography were unknown then—or in 1909 when the term was reincorporated into the current statute—is of no signifi-

cance.[21] As stated in *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, *supra*, 5 F.2d at 411:

> "[T]he statute may be applied to new situations not anticipated by Congress, if, fairly construed, such situations come within its intent and meaning . . . While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries."

This eminently proper application of Congressional intent is reflected in numerous copyright decisions. See, *e.g.*, *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911); *Tiffany Productions, Inc. v. Dewing*, 50 F.2d 911 (D. Md. 1931); *Edison v. Lubin*, 122 Fed. 240 (3d Cir. 1903). *Cf. L.C. Page & Co. v. Fox Film Corp.*, 83 F.2d 196 (2d Cir. 1936).

The majority's departure from almost every principle of copyright law is also reflected in its discussion of petitioner's exclusive right to "publish" under §1(a) of the Copyright Act. (Pet. App. 11.) One thing is universally agreed upon regarding the definition of this term, or of "publication", as used in this statute: it means different things in different places in the statute. Accordingly, the majority below is incorrect in its assumption that the term publication "would seem to have about the same coverage" in different contexts. (*Id.*)

A touchstone to the proper construction of the concept was furnished in *American Visuals Corp.* v. *Holland*, 239 F.2d 740, 744 (2d Cir. 1956). After reviewing judicial construction of the term "publication" (as the act under section 10 of the statute which can either secure statutory protection or divest common law literary property rights), Judge Frank noted that "[i]n each

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[21] Indeed the development of xerography is akin to the development of photo-offset as a form of "printing" *i.e.*, producing entire written pages. This produced more of a change in a business medium (similar to marketing books through paperback editions or book clubs) than the more extreme development of an entirely new medium such as radio or motion pictures.

case the courts appear so to treat the concept of 'publication' as to prevent piracy."

Applying this guide to the present situation, the Government's making photocopies available to all users who want them is clearly infringement of petitioner's exclusive right to "publish". *Cf. Macmillan v. King*, 223 Fed. 862 (D. Mass. 1914); *National Geographic Socy. v. Classified Geographic, Inc.*, 27 F. Supp. 655 (D. Mass. 1939).

Thus the Government's operation of its photoduplication system amounts to the copying, printing, reprinting and publishing of petitioner's copyrighted journal articles. As a result, petitioner has established a *prima facie* case of infringement of its rights under §1(a). The Government is accordingly liable unless it has established that such *prima facie* infringement should be excused as "fair use." We submit that analysis of this question above amply demonstrates that the Government has not sustained its burden of proving this defense.

CONCLUSION

Petitioner asks this Court to direct an award of reasonable compensation to be paid by the Government for its use of petitioner's property. Accordingly, the judgment of the Court of Claims should be reversed and the case remanded for a determination of such compensation.

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SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,
Plaintiff-Petitioner,

v.

THE UNITED STATES,
Defendant-Respondent.

BRIEF AMICUS CURIAE BY THE INFORMATION INDUSTRY ASSOCIATION

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TABLE OF CONTENTS

		Page
I.	Nature and Interest of the Amicus Curiae.....	1
II.	The Ruling of the Court Below.....	9
III.	Issue.....	10
IV.	Argument:	
	A. As users and suppliers of information we have to pay for all things we use, and we expect reasonable payment when our products are used.....	11
	B. The function of the industry is to disseminate, not to withhold information.....	13
	C. The Court imposes requirement on industry to subsidize competitors in taking over the distribution function which produces revenue.....	16
	D. Major alteration in the relationship between libraries and publishers, and in the resulting information distribution system of the Nation, requires Congressional action.....	18

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BRIEF AMICUS CURIAE

BY THE INFORMATION INDUSTRY ASSOCIATION

This brief is submitted by the Information Industry Association with Petitioner's and Respondent's consent.

I.

NATURE AND INTEREST OF THE AMICUS CURIAE

The Information Industry Association (the"Association") is a membership associa-

tion with approximately 65 members. These run the gamut from large and small information companies to large and small manufacturers of technical equipment including computers and photocopiers. The members of the Association disseminate information accounting for billions of dollars' worth of sales a year. A great part consists of information material which has been selected, collated, editorialized and published at substantial expense and at great investment.

The basic function of this industry is in many respects the other side of the coin of traditional publishing. It is rooted in the abundance of information available to everyone in every discipline. As a general proposition it can be said that information companies identify particular information headaches of very specialized groups of people and seek to pre-process the information of interest to that group in such a way as to

facilitate its use.

The activities of member firms include, but are not limited to, the following:

(1) Topical publications--providing up-to-date information on all facets of a given special interest area, including law, regulations and/or tariffs topically arranged and cross referenced for easy access;

(2) Current awareness publications, such as indexes, collected tables of contents, abstracts, citation lists, reports on pending legislation, etc.;

(3) Catalogs, including mail-order catalogs, parts lists, price lists, and tables of interchangeable parts;

(4) Directories, including those classified by activity, address, etc.;

(5) Encyclopedias, directories, thesauri, finding lists and references, aids;

(6) Files searches, including computer searches of machine-readable files at the

computer site or by remote access terminals;

(7) Standing order services ranging from computer search of current publications through news clipping services offering delivery of information on specific interest profile topics;

(8) Manuals for operation and repair of equipment;

(9) Serial reports, such as court decisions, board rulings, financial reports;

(10) Periodic publication of related material, such as journals in hard copy or microform, and voice recordings of talks on related topics;

(11) Face-to-face meetings, such as symposia, conferences and conventions;

(12) Exhibits and demonstrations for educational, promotional or merchandising purposes;

(13) Tours of plants, facilities, monuments, museums, etc.

Although a variety of communications media are employed, all the above activities have in common the anticipation of the need for and the preprocessing of relevant information. They all involve the expenditure of time, money, and human effort in organizing information materials to meet anticipated needs. They all have a common objective--that of producing economically competitive information products relevant to the users interest, regardless of the media involved.

Many member activities relate to the preparation of what could be classed as "library materials"--materials in printed form for industrial, institutional, agency, business, shop, academic or personal collections. Others reorganize related reference materials for better access. Such products and services require frequent

reorganization and amendment to keep them current.

The whole information industry process is itself comparable to an individual author's efforts in creating a work. By taking an "exploded" view of the work of an information industry company it can be seen how its efforts relate to the creative efforts of an author.

The steps involved in creating and marketing an information product include:

(1) Start with the user. Identify his information problem or need. Spend time with him in his work environment to identify how he uses information, where he is when he needs information, whether he has an immediate need or a need that can be filled subsequently in time.

(2) Gather information from a wide variety of sources and experiences.

(3) Review it, analyze it, organize it, eliminate irrelevancies.

(4) Design a formula for putting it into machine readable form.

(5) Process it into a machine readable form

(6) Design a formula for manipulating the information within the machine to produce the specifically desired end product (4, 5 & 6 are not always necessary).

(7) Develop the graphic arts embodiment of that end product, and in other respects design and produce a "human-useable" product.

(8) Educate users to the advantages of the product and in other ways market the product to the group of users for whom the product is designed and developed.

Several points emerge from that list:

(a) Each of these steps, starting with the time spent identifying user needs and continuing through each step of the process to

the delivery of the product to the user, is complex and costly.

(b) The products of such efforts are works of authorship.

(c) By virtue of their special design and highly refined specialized markets, they are extremely sensitive to any attrition in the size of their expected market whether through photocopying or other replication methods for by-passing copyright protection. The economic viability of such products, whether they are to be created at all, depends pretty much on each user paying his fair share of the fully amortized cost of creating and delivering the product.

The interest of IIA is to underscore the significance of copyright and to emphasize the need to maintain the integrity of copyright as a funding mechanism for this process. Private risk capital will be applied to this process, and society will have the benefit

of continuing advances in the application of these varied technologies, only so long as the investors in this process have a reasonable expectation of receiving a reasonable return on their investment. The only alternative to the investment of private risk capital and the reliance on competition in the marketplace, not only the commercial marketplace, but the marketplace of ideas, is the reliance on the investment of state capital, and its attendant preemption of areas open to competition.

We believe that the Court of Claims' conclusions are in conflict with the basic principles of copyright law and endanger the economic viability, indeed the very existence, of the open, competitive marketplace of ideas on which our society depends.

II.

THE RULING OF THE COURT BELOW

The ruling of the Court below has applied a principle of fair use, applicable to labor-

ious hand copying, to the modern technology which permits rapid, massive and multiple copying by machine. In effect, the ruling of the Court below permits the copying in massive quantities by modern technology without payment of a royalty. It is respectfully submitted that such permission cannot help but endanger the revenue base which is an absolute necessity so that the production and dissemination of highly selective information can be economically sustained. It further will disrupt and be destructive of the economic relationships on which this nation's distinctive competitive marketplace of ideas depends.

III.

ISSUE

Is the operation of a comprehensive library duplication system, supplying thousands of copies of copyrighted articles, exempt from copyright infringement if it

serves the science community? If so, is that policy decision so major as to require legislative action?

IV.

ARGUMENT

A.

AS USERS AND SUPPLIERS OF INFORMATION WE HAVE TO PAY FOR ALL THINGS WE USE, AND WE EXPECT REASONABLE PAYMENT WHEN OUR PRODUCTS ARE USED.

As a result of the user/supplier dichotomy in the information industry we are extremely sensitive to the economic realities facing the user and the supplier of information. Since the industry is not subsidized by taxpayers it must charge for its products and services and pay for those products and services it uses that are created by others.

In analyzing how to accommodate the interests of science with those of publishers, the Court of Claims erred in failing to include in that balance the practices of the National Library of Medicine. While this

whole action has arisen out of the National Library of Medicine's desire to avoid paying the license fee requested by the plaintiff in this case, it seeks very substantial fees for its own products. Magnetic tapes containing citations to the indexed journal articles are available from NLM on a subscription basis. Individuals and organizations may subscribe for $30,000 per year under conditions prescribed by NLM regulations.1/

For the information it copies, NLM does not wish to pay. For the information it creates, it requires users in the science community to pay.

We seek only to emphasize that there are costs associated with the creation and distribution of information; costs which, in equity, should be fairly shared by the users of that

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1/ Selected Federal Computer-based Information Systems, Edited by Saul Herner and Matthew J. Velluci, Information Resources Press, Washington, DC, 1972, p. 98.

information, a view apparently supported by NLM's pricing policies on its products. We further believe, the traditional competitive marketplace for information, fostered by copyright laws, has been most effective in balancing these equities. The licensing proposal of the plaintiff in this case is illustrative of the cost-effective operations of that system and should not have been rejected by NLM or the Court of Claims.

B.

THE FUNCTION OF THE INDUSTRY IS TO DISSEMINATE, NOT TO WITHHOLD INFORMATION.

Copyright is a tool calculated to foster dissemination of information. By the simple expedient of granting the owner of the physical property on which an idea is stated a limited monopoly in the right to copy that statement, Congress has encouraged a large and growing number of people and companies willing to risk their resources in attaining

broad dissemination of the ideas contained therein.

What comes through the Court of Claims opinion is not only a misunderstanding of that system but of the people and companies so engaged. The Court of Claims was unwilling to rely on the offered licensing system in its words to "place such a risk of harm upon science and medicine." In this unwillingness the Court of Claims proposes instead to strip away from the publisher its most basic right, a right to reasonable compensation.

Apparently, the Court below was concerned lest by upholding the publisher's copyright, the publisher would extract exhorbitant prices from the user in science and medicine. Obviously, the element of competition is omitted from the Court's evaluation. If the copyright bundle of rights were to be exercised by the copyright owner at too high a price,

and others could produce comparable products at lower prices, competition would arise to provide the library and the user more competitively-priced services. The ideas expressed in copyrighted materials themselves are free to be used by others and the copyright system in this way encourages competition among suppliers of similar materials. It certainly is not contended that Williams & Wilkins holds a monopoly position in the science and medical publishing field. What needs to be recognized is the valuable contribution Williams & Wilkins, as well as many other commercial firms, are motivated to make under the protection offered their enterprise by copyright.

Stripped of the ability to withhold permission to make repeated and systematic photocopies, and in the face of the labor and capital intensive activities required for the competitive dissemination of information to-

day, publishers will have no choice but to abandon their entire function.

C.

THE COURT IMPOSES REQUIREMENT ON INDUSTRY TO SUBSIDIZE COMPETITORS IN TAKING OVER THE DISTRIBUTION FUNCTION WHICH PRODUCES REVENUE.

The publishing process can be viewed as a data stream with the intellectual material being introduced at one end, being processed through the whole series of steps required of publishers, and finally reaching the individual user. That data stream can be divided into two parts: creation and production, where the greatest costs are to be found, and distribution, where the revenues sustaining that data stream are generated.

The Court in refusing to find systematic photocopying as practiced by NLM an infringement of the publisher's copyright, substituted the NLM distribution mechanism for a distribution system of plaintiff's choosing (in this case, a simple and modest licensing

system). By so doing, the Court pushed the publisher out of the revenue generating portion of its business and substituted for it the National Library of Medicine. If sustained, the Court's decision would have a serious and severely damaging impact on the revenue generating activities of all companies in the industry nationwide, for the same reason.

NLM also markets information. By turning the distribution function over to NLM, the Court is requiring the plaintiff in this case to subsidize, through the investment it makes in creating its publications, the operations of a competitor in the field of information dissemination. This is patently inequitable and destructive of the purposes for which Congress enacted the copyright law.

D.

MAJOR ALTERATION IN THE RELATIONSHIP BETWEEN LIBRARIES AND PUBLISHERS, AND IN THE RESULTING INFORMATION DISTRIBUTION SYSTEM OF THE NATION, REQUIRES CONGRESSIONAL ACTION.

The IIA recognizes that we are on the brink of a new age. More and more of the events and artifacts of human existence are being dealt with in informational equivalents. As part of this process, new ways are being found to disseminate information. Photocopying is one of those new ways. A whole industry--the information industry--is emerging as an element of our economy--creating jobs, paying taxes and facilitating the functioning of a most complex society. This industry depends on a viable distribution system.

The distribution system based on copyright has served this nation well in the past. A mutually supportive system of

libraries and publishers has grown up built upon the copyright system. Our society is unprecedented in its openness and in having well-informed citizens capable of self-government.

What is at stake in this case is whether the viable distribution system based on copyright law established by Congress should be disrupted for the social policy reasons suggested by the Court of Claims. That court felt science should be exempt from copyright infringement and the practical effect of that decision would be to alter the basic relationship between libraries and publishers by judicial decision.

We believe there are policy questions of far-reaching effect not only for the nature of the nation's information distribution system, but for the way our society obtains and uses information. These are

questions requiring the full participation of the Congress and through it the people of the United States.

We urge, therefore, that the copyright system be upheld, that the decision of the Court of Claims be reversed, and that the Court find that systematic photocopying of copyrighted materials as practiced by NIH and NLM constitutes infringement.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,

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THE UNITED STATES,

Respondent.

BRIEF OF *AMICI CURIAE*, AMERICAN GUILD OF AUTHORS AND COMPOSERS, BEHAVIORAL PUBLICATIONS, INC., EDWIN H. MORRIS & CO., INC., HARCOURT BRACE JOVANOVICH, INC. AND MACMILLAN, INC., IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

PAGE

Preliminary Statement 2

The Interests of *Amici* 3

ARGUMENT:

POINT I—The Court below misconstrued the constitutional purpose of copyright and the nature of this case 4

POINT II—The photocopying of copyrighted works by respondent's libraries is a violation of the exclusive rights to "copy", "print", "reprint" and "publish" conferred by Section 1 of the Copyright Act 7

A. The Right To "Copy" Applies To Books and Periodicals 8

B. Photoduplication is a "Printing" and "Reprinting" Proscribed by Section 1(a) 16

C. The Libraries' Providing of Photocopies is "Publishing" Proscribed by Section 1(a) ... 20

D. The Relevance of Section 1(c) 21

Conclusion 22

Appendix 23

Cases Cited

PAGE

American Code Co. (Inc.) v. *Bensinger*, 282 Fed. 829 (2 Cir. 1922) 16

American Visuals Corporation v. *Holland*, 239 F.2d 740 (2d Cir. 1956) 17, 21

Blazon, Inc. v. *DeLuxe Game Corp.*, 268 F. Supp. 416 (S.D.N.Y. 1965) 9

Bobbs-Merrill Co. v. *Straus*, 147 Fed. 15 (2d Cir. 1906), aff'd 210 U.S. 339 (1908) 20

Chappell & Co. v. *Middletown Farmers Market & Auction Co.*, 334 F.2d 303 (3d Cir. 1964) 18

Continental Casualty Co. v. *Beardsly*, 253 F.2d 702, cert. den. 358 U.S. (1958) 21

Douglas v. *Cunningham*, 294 U.S. 207 (1935) 18

Eggers v. *Sun Sales Corporation*, 263 Fed. 373 (2d Cir. 1920) 10

Folsom v. *Marsh*, 9 Fed. Cas. 343 (Cir. Ct. D. Mass. 1841) 14

Foreign & Domestic Music Corp. v. *Licht*, 196 F.2d 627 (2d Cir. 1952) 11

Greenbie v. *Noble*, 151 F.Supp. 45 (S.D.N.Y. 1957) .. 6, 10

Interstate Circuit, Inc. v. *United States*, 306 U.S. 208 (1939) 3

Jeweler's Circular Pub. Co. v. *Keystone Pub. Co.*, 281 Fed. 83 (2d Cir.), cert. den. 259 U.S. 581 (1922) 20

Jewell-LaSalle Realty Company v. *Buck*, 283 U.S. 202 (1931) 9

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PAGE

Leon v. *Pacific Telephone & Telegraph Co.*, 91 F.2d 484 (9th Cir. 1937) 7

Macmillan Co. v. *King*, 223 Fed. 862 (D. Mass. 1914) .16, 21

Maloney v. *Stone*, 171 F. Supp. 29 (D. Mass. 1959) ... 10

Mazer v. *Stein*, 347 U.S. 201 (1954) 4

N. Y. Tribune v. *Otis & Co.*, 39 F.Supp. 67 (S.D.N.Y. 1941) 17

Patterson v. *Century Productions*, 93 F.2d 489 (2d Cir. 1937), cert. den. 303 U.S. 655 (1938) 19

Platt & Munk Co., Inc. v. *Republic Graphics, Inc.*, 315 F.2d 847 (2d Cir. 1963) 10

Rosemont Enterprises, Inc. v. *Random House, Inc.*, 366 F.2d 303 (1966), cert. den. 385 U.S. 1009 (1967) 14

R. R. Donnelley & Sons Co. v. *Haber*, 43 F. Supp. 456 (E.D.N.Y. 1942) 17

Sebring Pottery Co. v. *Steubenville Pottery Co.*, 9 F. Supp. 384 (N.D. Ohio 1934) 10

Shapiro, Bernstein & Co. v. *4636 S. Vermont Ave., Inc.*, 367 F.2d 236 (9th Cir. 1966) 18

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Washingtonian Publishing Co. v. *Pearson*, 306 U.S. 30 (1939) 8

White v. *Kimmel*, 193 F.2d 744 (9th Cir.), cert. den. 343 U.S. 957 (1952) 20, 21

White-Smith Music Publishing Co. v. *Apollo Co.*, 209 U.S. 1 (1907) 9

Wihtol v. *Crow*, 309 F.2d 777 (8th Cir. 1962) 7, 10, 17

Constitution and Statutes

PAGE

United States Constitution

Article 1, Section 8 ..... 2, 4

Copyright Act (17 U.S.C. § 1 et seq.)

Section 1(a) 7, 9, 10, 11, 13, 16, 20

1(b) 9

1(c) 9, 21

1(d) 9

1(e) 9

19 17

101(b) 10

101(d) 10

107 18

Bills and Reports

H. R. 19853 (59th Cong. 1st Sess.) 13

S. 6330 (59th Cong. 1st Sess.) 13

H. R. 25133 (59th Cong. 2d Sess.) 13

S. 8190 (59th Cong. 2d Sess.) 13

H.R. Rep. No. 2222, 60th Cong., 2d Sess. (1909) 11, 12

S. Rep. No. 1108, 60th Cong., 2nd Sess. (1909) 11, 12

Report of The Librarian of Congress for the fiscal year ending June 30, 1906 13

Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law (1961) 10

OTHER AUTHORITIES PAGE

Conferences on Copyright (1905-06) 12, 13

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U. S. Copyright Office Circular 45 (1972) 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,
Petitioner,

v.

THE UNITED STATES,
Respondent.

BRIEF OF *AMICI CURIAE*, AMERICAN GUILD OF AUTHORS AND COMPOSERS, BEHAVIORAL PUBLICATIONS, INC., EDWIN H. MORRIS & CO., INC., HARCOURT BRACE JOVANOVICH, INC. AND MACMILLAN, INC., IN SUPPORT OF PETITIONER

This brief is submitted jointly by the American Guild of Authors and Composers, Behavioral Publications, Inc., Edwin H. Morris & Co., Inc., Harcourt Brace Jovanovich, Inc. and Macmillan, Inc. with the consent of the parties. None of the above *amici* are members of the associations also filing *amicus* briefs.

Harcourt Brace Jovanovich, Inc. and Macmillan, Inc. (or their subsidiaries) are major, diversified publishers of general, scientific and educational works. Behavioral Publications, Inc. is a publisher of textbooks and journals.

Edwin H. Morris & Co., Inc. is a music publisher whose business includes educational music publishing of sheet music and folios. The American Guild of Authors and Composers is an association of approximately 2,500 American composers and lyricists.

Thus, the *amici* herein represent a broad spectrum of private enterprise creators and publishers of general, educational, scientific, and technical publications and musical compositions. The decision of the Court of Claims strikes at the heart of their private sector efforts and investments in the creation and dissemination of literary works.

The decision below, though purportedly limited to the rights of petitioner and the practices of the National Institutes of Health (NIH) and National Library of Medicine (NLM), raises general legal issues regarding copyright protection. The *amici* herein direct their argument to two of these issues: (1) the Court of Claims' erroneous view of the rights to "copy", "print", "reprint" and "publish" accorded to copyright proprietors by Section 1 of the Copyright Act; and (2) the Court of Claims' conclusion that the rights and privileges of copyright and the public interest are in conflict, which contradicts the Constitutions dictate that the grant of copyright "promote[s] the Progress of Science and Useful arts" (Article 1, Section 8).

Preliminary Statement

The decision of the Court of Claims in this case permitted the unauthorized reproduction and distribution of petitioner's entire copyrighted works. Its effect is to open the gates to the preemption of *amici's* literary property without compensation.

Clearly under our economic system private sector creators and publishers of intellectual property can survive only if the law remains protective of their proprietary rights in intangible property to the same extent as it respects private interests in tangible property. There is nothing novel or radical in the notion that literary prop-

erty is of economic worth to its creators and to the country's economy. Mr. Justice Roberts dissenting in *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208, 236 (1939), stated the general rule that creators of literary property are accorded "the same rights as inhere in other property under common law." At all times prior to the institution of this action and during its pendency, private sector authors and publishers have made it clear that they are not opposed to the fullest dissemination of their copyrighted works. However, they have insisted, as do *amici* now, on their rights to compensation.

It should be noted that the Court of Claims found that in the instant case "NIH leases its Xerox machines from Xerox Corporation which it pays according to the number of pages photocopied." F. # 15, Pet. App. 80.* However, in its express concern for the public interest the Court below saw no inconsistency between payments being made to the owner of the tangible photo-duplicating equipment and its holding that the public interest required unpaid-for duplication of copyrighted works.

The Interests of *Amici*

The *amici* herein include two of the largest educational and reference publishers in the country, a specialized publisher in the social sciences, a leading music publisher, and an association of the creators of musical works. All of the *amici* function in the private sector of our economy. They are dependent upon income from their copyrighted works to survive and continue their functions. Among *amici's* publications are various works which are particularly susceptible to unauthorized photocopying. These include: professional, academic and technical journals; text-

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* References to the Opinion and Findings of Fact ("F") of the Court of Claims are to the Appendix to Petition for Certiorari, herein referred to as "Pet. App."

books and scientific treatises; sheet music; consumable workbooks, tests and teaching materials and compilations, anthologies, encyclopedias and other reference works used in piecemeal fashion rather than read cover to cover. The decision of the Court of Claims permits wholesale, unlicensed and unpaid-for photocopying. Although on a short term basis this may appear desirable as facilitating the availability of these works, the inexorable long term consequences must be the erosion of incentive for private enterprise to invest in the creation and dissemination of such works.

ARGUMENT

POINT I

The Court below misconstrued the constitutional purpose of copyright and the nature of this case.

Article I, Section 8 of the U.S. Constitution provides that Congress shall have the power:

> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;"

Thus, the clear Constitutional purpose of copyright is to foster creativity and scholarship in order to facilitate and enrich the cultural and technological development of the nation. Because they envisaged a private enterprise economy, the framers of the Constitution established that this end would be best served by *economic* encouragement to *private sector* creators of intellectual property. In *Mazer* v. *Stein,* 347 U.S. 201, 219 (1954) this Court recognized that:

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights

> is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts'. Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."

Neither the creation of *ad hoc* judicial exemptions to the principle of economic incentive nor the preemption of private proprietary rights in intellectual property can or will serve the public welfare under the framework established by the Constitution. As stated by A.R. Spofford, Librarian of Congress from 1864 to 1897:

> "Without stopping to consider the theory of those who hold that there can be no property in ideas, that all human thought should be free, and that printed thought, no less than oral utterances, should be spread abroad as on the wings of the wind, without money and without price, it may be said that this kind of literary communism would result in starvation to authors, however pleasant or profitable it might be to the rest of mankind." [Spofford, *Copyright In Its Relations to Libraries and Literature,* 1 American Library Journal 84 (1876)].

In repeatedly emphasizing its view of the "personal" uses of copyrighted works by "scholars" (e.g., Pet. App. 8) and the use of respondent's libraries' photocopies by "scientists" for their "personal" purposes (e.g., Pet. App. 14) the Court below has perverted the language of the Constitution so that the public welfare is deemed not to be the objective of copyright protection, but merely an adversarial consideration. In place of the clear judgment expressed in the Constitution the Court of Claims substituted its view that the elimination of authors' and publishers' rights best serves the public interest.

The Court of Claims' decision is based on a fundamental misconception of the nature of this case. *This case simply does not involve a scholar's or scientist's personal (or other) use of copyrighted works.* It involves, rather, respondent's libraries regular and systematic production, promotion* and distribution *to* scholars, on a massive scale "dwarf[ing] the output of many small publishing companies",** of copies of petitioner's copyrighted works —i.e., it involves *publishing* in preemption of petitioner's own function.

As emphasized by a noted law school librarian, library photocopying of the type here at issue "constitutes two or more separate and distinct transactions: the copying by the library and transfer to the reader; and the reader's subsequent use of the copy. It is important to keep this in mind." Price, *Photocopying By Libraries of Copyrighted Materials*, 5 Bull. of the Copr. Soc. of the U.S.A. 345, 347 (1968). Only the first mentioned transaction is relevant to this case. "The library's act is complete at this point . . . [t]he reader did not make the copy; the library did. . . ." Price, *supra* at 355. Indeed, it was the libraries in this case which made the decision not to charge for the copies and not to compensate petitioner; and in the case of NLM, the library, not the reader, decided that photocopies would be provided in lieu of the original (F #20(c), Pet. App. 84).

It is established law that the reproduction of a copyrighted work, even if in response to a request by a third party, is an infringing act on the part of the copier. E.g., *Greenbie* v. *Noble*, 151 F. Supp. 45 (S.D.N.Y. 1957). That the ultimate recipient is a scientist or scholar making

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* E.g., through NLM's *Index Medicus;* see F #20(c), Pet. App. 83.

** Pet. App. 31 (Cowan, C.J. dissenting).

personal use of the copy is both an inaccurate view of the facts of this case* and entirely irrelevant.

Scholars and scientists are, of course, the principal market for much of *amici*'s works. The servicing of their needs for retained personal copies of copyrighted works is, under our private enterprise system, a function to be performed by publishers, not by extension of the reference and loan function of libraries. The Court of Claims' failure to recognize this fact of economic life pervades its entire opinion. It is particularly relevant to the lower Court's erroneous and unprecedented application of the doctrine of "fair use." Cf. *Leon* v. *Pacific Telephone & Telegraph Co.*, 91 F.2d 484, 486 (9th Cir. 1937); *Wihtol* v. *Crow*, 309 F.2d 777 (8th Cir. 1962). The Court below explained that in the *Wihtol* case, a finding of copyright infringement rather than fair use was proper because it was "as if the defendant had purchased one copy of sheet music and then duplicated it for an entire chorus." Pet. App. 13 n. 12. It is submitted that this is a very accurate description of respondent's practices here at issue. The facsimile duplication of entire scientific works for dissemination to any interested member of the scientific community is an appropriation, not a "use," of literary property.

POINT II

The photocopying of copyrighted works by respondent's libraries is a violation of the exclusive rights to "copy", "print", "reprint" and "publish" conferred by the Copyright Act.

Section 1(a) of the Copyright Act accords to the owner of copyright in all "copyrighted works" the "exclusive

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* Approximately 12% of NLM's photocopies were provided to private commercial businesses. F #21(a), Pet. App. 84. Also, neither NIH nor NLM imposed any restrictions on the receiving parties' use of the photocopies. The record demonstrates that some requesters "put them in files for use by co-workers or others." [F #6(b), Pet. App. 76], and others "make further photocopies from copies obtained from the . . . library to distribute to colleagues or otherwise" [F #17(b), Pet. App. 81].

right" to "print, reprint, publish, copy and vend." Notwithstanding the unambiguous language of the statute, the majority of the Court of Claims expressed a "solid doubt" whether the right to "copy" established in section 1(a) applies to books and journals. Pet. App. 9. The Court's conclusion on this point must be considered more than mere *dicta* because it expressly considered this doubt to be a "powerful factor" in determining that the activities of respondent amounted to fair use. Pet. App. 23. The Court also held that the photocopying activities of respondent did not amount to a "print[ing], reprint[ing] or publish[ing]" within section 1(a). Pet. App. 10-11.

In reaching these results the majority of the Court of Claims perverted the clear meaning of the statutory language, ignored the applicable precedents and the findings of fact in the case, and drew unsupportable inferences from matters outside the trial record. A most apt description of the decision below is that used by this Court in *Washingtonian Publishing Co.* v. *Pearson*, 306 U.S. 30, 39 (1939): "[It does] not square with the words actually used in the statute, would cause conflict with its general purpose, and in practice produce unfortunate consequences. We cannot accept it."

Amici respectfully urge that (A) the right to "copy" is applicable to books and periodicals, (B) the photoduplication of copyrighted works is a "printing" and "reprinting" thereof, (C) the respondent's libraries providing of photocopies of copyrighted works to library users is a "publishing" thereof, and (D) the rights of "reproduction" and "transcription" of section 1(c) of the Copyright Act are relevant to this case.

A. The Right To "Copy" Applies To Books and Periodicals.

The photoduplication of copyrighted works is a "copying" thereof. Respondent produced facsimile reproductions of petitioner's works in a fixed, tangible and visually perceivable form. In *White-Smith Music Publishing Co.*

v. *Apollo Co.*, 209 U.S. 1, 16 (1907) this court held that the word "copy" as used in the Act refers to that term "in its ordinary sense of indicating a reproduction or duplication of the original."* See also, e.g., *King Features Syndicate* v. *Fleisher*, 299 Fed. 533, 535 (2d Cir. 1924); *Blazon, Inc.* v. *DeLuxe Game Corp.*, 268 F. Supp. 416, 434 (S.D.N.Y. 1965). Indeed, in contemporary usage photomechanical duplication is the essential act of proscribed copying. See *Walt Disney Productions* v. *The Air Pirates*, 345 F. Supp. 108, 110 (D. Cal. 1972) ("While the character was not copied in the sense that it was photographically reproduced, it was drawn as nearly like the plaintiff's drawing as defendant could make it.")

The majority of the Court of Claims was apparently not disposed to frontally question the irrebuttable conclusion that respondent's libraries had "copied" petitioner's works. They achieved the same result by asserting that the right to "copy" under Section 1(a) might not "appl[y] to books and journals" (Pet. App. 9), thus suggesting that the principal component of *copy*right protection is inapplicable to the major vehicles of literary creation. However, this assertion is equally unsupportable. As this Court has observed, one of the "monopolies" conferred by the Copyright Act is "that of making copies" [*Jewell-LaSalle Realty Company* v. *Buck*, 283 U.S. 202, 204 (1931)], and the "copying" right so accorded by Section 1(a)—unlike the rights accorded by other provisions of Section 1 of the Copyright Act**—is expressly applicable to all "copy-

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* Although the *White-Smith* court concluded that a pianola role is not a "copy" of the recorded music, that is irrelevant to this case. Respondent's activities result in a visually perceivable duplication in "intelligible notation" and thus meet the very definitional tests there established by this Court.

** Thus, Section 1(b) deals particularly with "literary works", "non-dramatic works", "dramas", "musical works" and "models or designs"; Section 1(c) treats specifically of "lectures, sermons, addresses" and "literary works"; Section 1(d) is directed to dramatic works and 1(e) to musical compositions. These provisions as to exploitation of specific works are to be contrasted with the general applicability of Section 1(a) to "copyrighted work[s]".

righted work[s]", without distinction or limitation. The Register of Copyrights has noted that under Section 1(a) "*all categories* of copyrighted works are protected against the making and publication of copies", and Section 1(a) embraces "the twofold right to make and publish copies". Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 21-22 (1961) (emphasis added).

That the right to "copy" is applicable to books and periodicals is clearly established by case law. In *Greenbie* v. *Noble*, 151 F. Supp. 45, 63 (S.D.N.Y. 1957), an action for infringement of copyright in a book, the court observed that "the mere printing or copying of a copyrighted work, without proof of sales thereof, will constitute an infringement". See also, e.g., *Maloney* v. *Stone*, 171 F. Supp. 29, 32 (D. Mass. 1959); *Platt & Munk Co., Inc.* v. *Republic Graphics, Inc.*, 315 F. 2d 847, 851 (2d Cir., 1963). As stated in *Wihtol* v. *Crow*, 309 F. 2d 777, 780 (8th Cir. 1962), "obviously the plaintiffs had the exclusive right to copy their copyrighted song and obviously [defendant] had no right whatsoever to copy it". This principle is as applicable to books and journals as it is to songs; the "infringement" of a "book" is "the copying of some substantial and material part thereof". *Eggers* v. *Sun Sales Corporation*, 263 Fed. 373, 375 (2d. Cir. 1920).

The applicability of the right to "copy", without more, to books and periodicals is also demonstrated by other sections of the Copyright Act. Thus, Section 101(b) provides for the assessment of statutory damages for the infringement of books and periodicals in an amount of $1 "for every infringing copy made *or* sold by *or* found in the possession of the infringer . . . . [emphasis added]". As noted in *Sebring Pottery Co.* v. *Steubenville Pottery Co.*, 9 F. Supp. 384, 387 (N.D. Ohio 1934), statutory damages under this provision "may be assessed against all copies made, not merely those distributed." Similarly,

under Section 101(d) all "infringing copies" of "any work" (§ 101, preamble) are subject to destruction and this must, of necessity, involve copies "made" but not "sold". *Cf. Foreign & Domestic Music Corp.* v. *Licht*, 196 F. 2d 627 (2d Cir. 1952). These provisions of Section 101 make it abundantly clear that "infringement" occurs upon the mere "making" of copies of books and journals.

The legislative history of the Copyright Act of 1909 is most relevant. Provision for the right to "copy" in Section 1(a) did not slip unobstrusively into the law; both the House and Senate Committees reporting on the relevant bills specifically noted the "insertion of the word 'copy'". H.R. Rep. No. 2222, 60th Cong., 2d Sess. 4 (1909); S. Rep. No. 1108, 60th Cong., 2d Sess. 4 (1909).

The Trial Judge in this case believed it "reasonable to infer" that the addition of the "copying" right was made "in light of the fact that new technologies (e.g., photography) made it possible to duplicate books and periodicals by means other than 'printing' and 'reprinting'". Pet. App. 45, 50. The majority below disagreed, crediting instead an argument that the 1909 Act did "not suggest any purpose to alter the previous coverage". Pet. App. 9. However, a careful examination of the appropriate legislative history clearly demonstrates the accuracy of the Trial Judge's suggestion. Thus, in the President's message to Congress in 1905 in connection with the revision program which culminated in the 1909 Act, he observed that the then-current copyright laws "omit provision for many articles which, under modern reproductive processes, are entitled to protection". Congressional Record, Dec. 5, 1905 at 102. As suggested by the Trial Judge, Congress was acutely aware of and concerned with the effects of new reprographic devices. Indeed, both the House and Senate Reports on the 1909 Act refer to the President's message, including the above passage, after quoting an address by a prominent attorney

of the time:

> ". . . the reproduction of various things which are the subject of copyright has enormously increased. The wealth and business of the country *and the methods and means of duplication* have increased immeasurably. The law requires adaptation to these modern conditions". [H.R. Rep. No. 2222, 60th Cong., 2d Sess. 1 (1909); S. Rep. 1108, 60th Cong., 2d Sess. 1 (1909) (remarks of Hon. Samuel J. Elder, Esq.; emphasis added)]

Also significant are the changes in wording of the various bills ultimately emerging as the 1909 Copyright Act. The original "Memorandum Draft of A Bill To Amend and Consolidate the Laws Respecting Copyright" prepared by the Copyright Office for the 1905 revision conferences* accorded copyright proprietors the exclusive right "to make for sale, distribution, exhibition, or hire any copy by any means whatsoever, or in any form, or for any purpose, of a work the subject of copyright . . ." Memorandum Draft § 37(a) in Conferences on Copyright, Second Session (November 1-4, 1905).** When the Register of Copyrights presented this draft provision to the conference members, he specifically omitted the words "for sale, distribution, exhibition or hire", retaining the copying "for any purpose" clause without qualification. Conferences on Copyright, Second Session at 314-315 (meeting of November 3, 1905). Accordingly, when the Copyright Office presented its revised "Memorandum

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* The conferences were convened by the Librarian of Congress and attended by various interested organizations to consider overall revision of the copyright laws. See generally, Goldman, *The History of U.S.A. Copyright Law Revision From 1901 to 1954*, Copyright Law Revision Study No. 1 at 1-3 (1955).

** References are to the Conference documents as collected in the volumes of the U.S. Copyright Office.

Draft" to a later session of the revision conference, the "exclusive rights" of a copyright proprietor included the right "to make any copy by any means whatsoever, or in any form, or for any purpose . . ." Memorandum Draft § 55(a) in Conferences on Copyright, Third Session (March 13-16, 1906). At the conclusion of the revision conferences, the Copyright Office redrafted its proposed revised copyright law, submitting it to Congress on May 31, 1906 as H. R. 19853 and S. 6330 (59th Cong. 1st Sess.). Section 1(a) of this bill accorded copyright proprietors the exclusive right "to make any copy of any work" for the purposes of sale, distribution, exhibition or leasing; however, section 22 expressly added a prohibition of *"any* reproduction, without the consent of the author or copyright proprietor, of any [copyrighted] work . . . [emphasis added]." That section 22 was an "addition" and that the word "any" was intended as all-inclusive is made clear by the Librarian of Congress' report on the bill. He noted:

> "The bill, having defined the right of the copyright proprietor as the *exclusive* right to do certain things, defines an infringement to consist in the doing or causing to be done without his consent of any of these things, the right to do or to authorize which is reserved to him. It contents itself with this, adding only the one specification that *'any* reproduction' without his consent 'of any work or material part of any work in which [his] copyright is subsisting' shall be an infringement". [Report of the Librarian of Congress for the fiscal year ending June 30, 1906 at p. 116; emphasis in original].

After the Hearings on these bills were completed, the Register of Copyrights and the Committees of the House and Senate redrafted the bill, introducing a revised bill on January 29, 1907 as H. R. 25133 and S. 8190 (59th Cong. 2d Sess.). In these bills, Section 1(a) was revised to adopt the present language according the rights to "print, reprint, publish, copy and vend" without limitation

and this phraseology remained the same in the later bills culminating in the Act of 1909. From what had gone before, it is clear that the right to "copy" in the 1909 Act is absolute and not restricted as to purpose, technique or otherwise in its application to books and periodicals.

In reaching its "doubt" as to the applicability of the right to copy to books and periodicals, the majority of the Court of Claims relied on the fact that " the court-created doctrine of 'fair use' . . . is alone enough to demonstrate that Section 1 does not cover all copying". Pet. App. 8. However, the quoted proposition is irrelevant to the point at issue. "Fair use" is a *privilege* to engage in certain kinds of copying of a work which would *otherwise violate the "copying" rights accorded by the Act to that work. Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 303, 306 (1966), cert. denied 385 U.S. 1009 (1967). It assumes that the right to "copy" *is* applicable to the work used; if it were not, the privilege of fair use would be unnecessary. The majority's error in relying on the doctrine of fair use as proof that the right to copy is not applicable to books and journals is compounded subsequently in its opinion, where it states that one reason respondent's photocopying should be considered fair use is because of its doubt as to the applicability of the right to copy. Pet. App. 23. Thus, the majority's reasoning is entirely circular—there may be no exclusive right to "copy" books and journals because of fair use; and there is fair use because there may be no right to copy books and journals. It should be noted that even the doctrine of fair use traditionally applied by the courts is based on criteria protective of the economic interests of copyright proprietors. See, e.g., *Folsom* v. *Marsh*, 9 Fed. Cas. 343 (Circ. Ct. D. Mass. 1841).

The Court below also asserted that "it is almost unanimously accepted that a scholar can make a handwritten copy of an entire copyrighted article for his own use . . . ." Pet. App. 8. This assertion too is irrelevant. Even

apart from the fact that this case does not involve a scholar's own use (Point I), since the invention of the Gutenberg press it has been known that there is no rational equation between manual transcription and mechanical duplication. The former has no economic consequences while the latter is the basis for the existence of the entire publishing industry.

To support its "doubt" that the right to copy applies to books and periodicals, the Court of Claims also relied on certain "Rules" of the Library of Congress applying to the Library's photoduplication of materials during "the time of enactment and first three decades of the 1909 Act" and the tenure of Herbert Putnam, "a leading public sponsor of the 1909 Act", as Librarian of Congress. Although the Court considered the Library's activities to be "revealing" (Pet. App. 9) and "illuminating" (Pet. App. 10) it again missed the mark.

Assuming that the early practices of the Library of Congress are probative of the meaning of the 1909 Copyright Act, the relevant question is not simply whether the Library performed photoduplicating services, but whether such services encompassed the reproduction of copyrighted works without permission of the copyright owner (and, if so, under what circumstances, to what extent, and of how much of the work). Since the documents relied upon by the majority below were never offered into evidence at the trial of this case (they surfaced as part of argument in an *amicus* brief in support of respondent below), petitioner was never able to examine on these issues. The Court of Claims' reliance is thus based on a unilateral inference that the Library freely engaged in wholesale copying of copyrighted works, without permission, drawn from unexplained and ambiguous factual statements existing *dehors* the trial record.

A careful study of the history of photoduplication by the Library of Congress—which must perforce also go out-

side the record—shows other possible inferences to be drawn from the Library's practices and, indeed, strongly suggests that the Library's interpretation of the 1909 Act was that it *forbad* the photoduplication of copyrighted books and journals without permission. An analysis of the sources relied upon by the Court of Claims and others not called to its attention is set forth in the Appendix to this brief.

B. Photoduplication is a "Printing" and "Reprinting" Proscribed by Section 1(a).

In concluding that respondent's libraries had not "printed" or "reprinted" petitioner's works within the meaning of Section 1(a), the Court of Claims first stated that "the photocopy process of NIH and NLM . . . does not even amount to printing or reprinting in the strict dictionary sense . . . ." Pet. App. 10-11. Among the numerous dictionary definitions of "print", however, is "to produce by means of a reproductive process". Random House Dictionary of the English Language 1144 (Unabridged Ed., 1969). The statutory use of "print" and "reprint" cannot reasonably be limited to letterpress. See *Macmillan Co.* v. *King*, 223 Fed. 862, 867 (D. Mass. 1914). If it is so limited, *amici's* works will be shorn of protection not only from the users of Xerox machines, but also from reproduction by offset, microform, and the various other photography-based techniques which are replacing the letterpress and, indeed, are the essence of the contemporary reprint industry. See Nemeyer, Scholarly Reprint Publishing in the United States 4 (1972). To state this proposition is to refute it; for both practical and statutory purposes, the Xerox machine is as much a printing device as the Gutenberg press or letterpress.

Numerous cases have found infringement of copyrighted text by photomechanical processes. See, e.g., *American Code Co. (Inc.)* v. *Bensinger*, 282 Fed. 829 (2 Cir. 1922)

(photolithography); *N.Y. Tribune* v. *Otis & Co.*, 39 F. Supp. 67 (S.D.N.Y. 1941) (photostat); *R. R. Donnelley & Sons Co.* v. *Haber*, 43 F. Supp. 456 (E.D.N.Y. 1942) ("photographic process"); *American Visuals Corporation* v. *Holland*, 239 F. 2d 740 (2d Cir. 1956) (photostat); see also, *Wihtol* v. *Crow*, 309 F. 2d 777 (8th Cir. 1962) ("school duplicating machines"). That "printing" for statutory purposes includes photographic printing techniques is also demonstrated by the direction that the copyright notice for motion pictures and videotapes include the year of first publication. See U.S. Copyright Office Circular 45 (1972). Under the Act, the year of publication can only be required of "printed" works. 17 U.S.C. § 19.

Alternatively, the Court below stated that "print" and "reprint" might "be used more broadly to include all mechanical reproduction of a number of copies", but held that this "would still not cover the making of a single copy for an individual requester". Pet. App. 11. This definition and exclusion lacks support in both fact and law.

As has been noted, "[t]he ability to produce single copies economically is the major feature of the reprographic revolution". *New Technology and The Law of Copyright: Reprography and Computers*, 15 U.C.L.A.L. Rev. 939, 941 (1968). Entire reprinting businesses are based on the concept of "on-demand reprinting" of "single copies" in response to "individual requests"; "single copy reprints" and "1 copy editions" is common terminology. See, e.g., Melcher, *New Techniques Permit the Reprinting of Books in Editions of 1 to 100 Copies*, 1960 American Library & Book Trade Annual 101 (Melcher's description of the single-copy on-demand printing techniques of University Microfilms, utilizing microfilm and Xerox Copyflo printers, is remarkably similar to the techniques used by respondent's libraries. See F # 15, Pet. App. 80; F # 21 (b), Pet. App. 84.); *" 'Demand' Publishing and Reprint Publishing"*, Publishers Weekly, July 29, 1968 at 22; *"There's Money in Microfilms"*, Business Week, April 22, 1961 at

145. The majority's alternative definition concedes, as it must, that "printing" and "reprinting" include contemporary means of "mechanical duplication"; there can be no legal or economic logic for including in that definition only those systems producing multiple copies in response to single requests.

The Court's conclusion is also in conflict with established law that copyright infringement does not depend on the number of copies or recipients involved. See *Douglas* v. *Cunningham*, 294 U.S. 207, 210 (1935); *Shapiro, Bernstein & Co.* v. *4636 S. Vermont Ave., Inc.*, 367 F. 2d 236 (9th Cir. 1966). It also conflicts with the principle that "printing" is an act of infringement independent of the circumstances of any request made to the printer. See 1 Nimmer, Copyright § 102.

The Copyright Act expressly bars the one-at-a-time importation into the United States of even *single* "piratical" —i.e., infringing—copies for the use of an *individual* (the same bar extends to importation of single copies for educational or scientific purposes, or by schools or libraries). 17 U.S.C. § 107, *proviso*. There can be no justification for permitting domestic production of unauthorized copies under similar circumstances. Similarly, copyright has been held infringed by a single performance. See e.g., *Chappell & Co.* v. *Middletown Farmers Market & Auction Co.*, 334 F. 2d 303 (3d Cir. 1964). If such ephemeral use constitutes infringement, all the more so must the production of a tangible copy capable of permanently satisfying consumer demands.

Furthermore, respondent's libraries do reproduce multiple copies of the same work. As noted by the Trial Judge, the "single copy per request" limitation is "illusory and unrealistic." Pet. App. 45, 52. Thus he noted that:

> "Admittedly, the libraries, as a general rule, make only one copy per request, usually for different users.

> But the record shows that the libraries duplicate particular articles over and over again, sometimes even for the same user within a short timespan. E.g., the NIH library photocopied the Count I article three times within a 3-month period, two of the times for the same requester; and it copied the Count IV and Count V articles twice within a 2-month period, albeit for different users. The record also shows that NLM will supply to requesters photocopies of the same article, one after the other, on consecutive days, even with knowledge of such facts. In short, the libraries operate comprehensive duplication systems which provide every year thousands of photocopies of articles, many of which are copies of the same article; and, in essence, the systems are a reprint service which supplants the need for journal subscriptions. The effects of this so-called 'single copying' practice on plaintiff's legitimate interests as copyright owners are obvious. The Sophar and Heilprin report, at 16, puts it in terms of a colorful analogy; 'Babies are still born one at a time, but the world is rapidly being overpopulated' ".

There can be no rational basis for making copyright protection dependent upon whether one or more copies are produced, or whether they are produced for the same or different users, or whether the same user makes his request at one or more times. Moreover, the microfilm/Xerox Copyflo techniques utilized by defendant's libraries apparently did regularly make multiple copies (a microfilm copy and a Xerox copy) of the same work at the same time in response to the same request. See F. #15, Pet. App. 80; F. #21(b), Pet. App. 84. *Cf. Patterson* v. *Century Productions,* 93 F.2d 489, 493 (2d Cir. 1937), cert. den. 303 U.S. 655 (1938). If this requires even further distinctions, it serves thereby to demonstrate the illogic of the "single copy" argument.

C. The Libraries' Providing of Photocopies Is "Publishing" Proscribed by Section 1(c).

After holding that respondent had not violated petitioner's exclusive right to "print and reprint" its works, the Court of Claims held that "for similar reasons" respondent's libraries had not violated petitioner's rights to "publish" its works. To the extent that the Court's reasoning on this issue encompasses the thought that the dissemination of a "single copy" cannot be a publication, it is rebutted by the authorities and points referred to above. See also, e.g., *Bobbs-Merrill Co.* v. *Straus,* 147 Fed. 15 (2d Cir. 1906), aff'd 210 U.S. 339 (1908) ("publication" by sale of a single copy).* Of course, a large portion of the commercial market for *amici's* publications comprises single copies sold to individual customers.

NIH made photocopies available to any of its personnel and NLM made photocopies available to any requesting party through inter-library loan. In neither case was the copy required to be returned; nor were there any restrictions placed on the recipients' rights to further disseminate or duplicate the photocopies. See fn. p. 7, *supra.* In both cases the library functioned simply to provide interested parties with copies of petitioner's works for whatever use they might wish—i.e., for the same purpose as petitioner and *amici* distribute their works. As a matter of law, as a matter of function, and even as a matter of semantics, respondent's libraries "published" copies of petitioner's works. See, e.g., *White* v. *Kimmel,* 193 F. 2d 744 (9th Cir.) cert. den. 343 U.S. 957 (1952); *American*

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* The *Bobbs-Merrill* court did refer to copyright as the right to "multiply copies". However, this does not suggest agreement with the Court's "single copy" argument. Respondent's libraries had one copy and made (at least) one more. The resulting (minimum of) two copies was a "multiplication". As pointed out in *Jeweler's Circular Pub. Co.* v. *Keystone Pub. Co.,* 281 Fed. 83, 94 (2d Cir.) cert. den. 259 U.S. 581 (1922) to define copyright as the sole right of multiplying copies "means that you must not copy matter copyrighted."

Visuals Corporation v. *Holland,* 239 F. 2d 740 (2d Cir. 1956); *Continental Casualty Co.* v. *Beardsley,* 253 F. 2d 702, cert. den. 358 U.S. 816 (1958).

The majority's purported analogy to the doctrine of a limited publication which does not divest common law rights is inappropriate. Under the reported cases, the distribution of copies in the manner at issue would not fall within this doctrine. See *White* v. *Kimmel, supra*; *American Visuals Corporation* v. *Holland, supra;* see also, *Continental Casualty Corp.* v. *Beardsley, supra.* In any event, even a "limited publication" is an infringement of section (1a). *Macmilian Co.* v. *King,* 223 Fed. 862 (D. Mass., 1914). This is consistent with the fact that (i) the doctrine of limited publication is designed to avoid a forfeiture of common law rights and hence *protect* literary property owners from infringement; and (ii) a limited publication is sufficient to *invest* the rights of statutory copyright. As stated in *American Visuals Corporation* v. *Holland, supra* at 744: "[i]n each case the courts appear to treat the concept of 'publication' as to prevent piracy."

D. The Relevance of Section 1(c).

Section 1(c) of the Copyright Act, as amended in 1952, accords to the proprietor of copyright in a "nondramatic literary work" (which would include petitioner's journals and much of *amici*'s works) the exclusive rights, *inter alia,* to "reproduce it in any manner or by any means whatsoever" and to make "any transcription" thereof. It is submitted that the infringement issue in this case could be resolved simply on the basis of the rights of reproduction and transcription in section 1(c). Since, however, this provision was not cited below and we do not believe it necessary to a determination of infringement, we would merely call it to this Court's attention as indicative of the intent of the statute to protect the copyright owner against any means of *reproducing* his work, regardless of the varying technology which might be developed to achieve this end.

CONCLUSION

The interpretations of the Copyright Act by the Court of Claims are in error and the order dismissing the petition should be reversed.

Respectfully submitted,

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APPENDIX

Photocopying Rules and Practices of the Library of Congress

(1) The Court of Claims noted that while the bills leading to the Copyright Act of 1909 were being considered by Congress, the Library's 1908 "Rules of Practice Governing the Use and Issue of Books" (p. 6) provided:

> "Photographing. Photographing is freely permitted. The permission extends to the building itself and any of its parts, including the mural decorations. It extends to articles bearing claim of copyright, but the Library gives no assurance that the photograph may be reproduced or republished or placed on sale. These are matters to be settled with the owner of the copyright".

The very language of this provision indicates that it was concerned not with the Library's photoduplication of books and journal "articles," but rather with library visitors taking "snapshots" or the like of three-dimensional artifacts. (See the dissenting opinion of J. Nichols below, Pet. App. 69.) This is also suggested by the fact that the Library of Congress apparently did not install a photostat machine until 1912,* and by the fact that, as noted below, specific provision for photostatic reproduction services was made *in addition to* the "Photographing" provision in editions of the Library's Rules issued after that year. (That the Library's "permission" extended to copyrighted three dimensional objects on its premises is irrelevant to this case since the effects and circumstances of such practices

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* See Thompson, *The Microfacsimile in American Research Libraries,* 8 Libri (Int'l. Lib. Rev.) 209 (1958). Originally, of course, a "photocopy" in the sense at issue in this case "was a photostat and nothing but a photostat". Hawken, *Reprographic Technique: Present and Future* in Hattery & Bush, Reprography and Copyright Law 39 (1964).

are entirely different. Moreover, it indicates absolutely nothing about the point at issue—*viz.*, whether the right to copy applies to books and periodicals.)

(2) The Court of Claims also noted that after the passage of the Copyright Act of 1909, the 1913 edition of the Library's "Rules" added a provision entitled "Photostat" after the "Photographing" section. The "Photostat" section stated:

> "Photo-duplicates of books, newspapers, maps, etc. can be furnished at a reasonable rate by means of the photostat, installed in the Chief Clerk's Office. Apply to the Chief Clerk for a schedule of charges." [Lib. of Cong., Rules of Practice Governing the Use and Issue of Books 6 (1913); Pet. App. 10]

This provision says nothing about whether the subjects of such photoduplication might include copyrighted works and, if so, to what extent, etc. Since, in the retained provision on "photographing" [Pt. (1), above] the Library felt it necessary to specify that copyrighted artifacts might be photographed, the proper inference to be drawn from the silence of the photostat provision might well be that copyrighted books, etc. would not be copied without permission. This is also suggested by changes in later editions of the "Rules" noted below. On its face, however, this provision is totally ambiguous with respect to the relevant points at issue.

Consideration should also be given to the nature of these so-called "Rules". They did not purport to be a complete or detailed compendium of Library regulations. They represented "a body of practice rather than a formal set of definitions adopted at one time, or *a priori*" and an attempt to "summarize" the Library's experience.

Appendix

Library of Congress, Rules of Practice Concerning The Use and Issue of Books 3 (1913).

(3) The Court of Claims further asserted that later editions of the Library's Rules "throughout Dr. Putnam's tenure (which ended in 1939), contained the same or comparable provisions". Pet. App. 10. This is simply incorrect. In 1921, the "Photostat" section was changed to refer to the "photoduplicat[ion] of *certain classes* of books . . ." (emphasis added). Library of Congress, Rules of Practice Concerning the Use and Issue of Books 6 (1921). (This qualification was repeated in the subsequent editions of the Rules in 1929 and 1932). In view of the retained reference to the permissible "photographing" of copyrighted artifacts and subsequent specific references to the Library's refusal to photoduplicate copyrighted textual works [Pt. (4), below] it is at least a fair inference that copyrighted books and journals were among the forbidden "classes". This qualification as to "classes" was retained in the 1929 and 1932 editions of the Rules. However, in the 1939 edition (p. 5) the "Photostat" section was changed again and now referred simply to the fact that "The Library of Congress maintains a Photoduplication Service [i.e., as a department] from which copies (on film or paper) of available materials may be obtained at nominal cost." As noted immediately below, a basic tenet of the Library's Photoduplication Service from its inception has been the refusal to duplicate copyrighted works without permission.

(4) It is apparent that the Library of Congress did provide photostats, although not necessarily of *copyrighted* works, from 1912 through 1938. However, the extent of photocopying was apparently rather minimal in view of the lack of sufficient government appropriations for photographic apparatus. See Schwegmann, *The Photoduplication Service of The Library of Congress*, J. Docu-

mentary Reproduction, September, 1939 at 176. (Mr. Schwegmann also referred to "legal limitations" as a bar to meeting all photocopy requests prior to establishment of the Photoduplication Service. Id. Although not entirely clear, it is not unreasonable to assume that copyright was among such limitations. If this was the case it is clear from the announced policies noted subsequently that although the establishment of the Photoduplication Service solved the Library's financial needs, it did not remove the limitation imposed by copyright).

In 1938 Dr. Putnam accepted a grant from the Rockefeller Foundation and established the Library's Photoduplication Service. See Schwegmann, *supra*; Annual Report of the Librarian of Congress for the Fiscal Year Ending June 30, 1938 at 312.

In 1939-40 the Service commenced regular operations. See Annual Report of the Librarian of Congress for the Fiscal Year Ending June 30, 1940 at 192. *Virtually from its inception the announced policy of the Photoduplication Service has been that it will not reproduce copyrighted works without permission;* the relevant statements suggest that such restraint had always been the basic policy of the Library. See e.g., The Library of Congress—Its Collections and Services (Gov't. Pr. Off.—1941 ed. at 9; 1942 ed. at 12; 1945 ed. at 12) (The Photoduplication Service provides copies "subject to the usual copyright limitations"); Annual Report of the Librarian of Congress for the Fiscal Year Ending June 30, 1947 at 35 ("The Library must of course in its photocopying activities scrupulously observe copyright, and accordingly never reproduces work in which copyright is claimed, without the proprietor's permission"); The Library of Congress and Its Work at 9 (Gov't. Pr. Off. 1950) ("Copies of materials . . . in photostat . . . not subject to copyright or other restrictions are provided at a moderate charge"); The Library of Congress—1800-1950—Photoduplication Service at 2 (Lib. of Cong. 1950)

("Copyrighted material will ordinarily not be copied without the signed authorization of the Copyright Owner"*).

(5) In 1944 a bill was introduced in Congress which specifically provided that under certain circumstances the making of a photocopy of copyrighted works by the Librarian of Congress for, among others, members of the public was not an infringement of copyright. S. 2039, 78th Cong., 2d. Sess. Its introduction is further evidence that the Library considered itself bound by copyright restrictions as a matter of basic policy. (No action was taken on this bill; however, in view of the policy of not copying copyrighted materials followed by the Library even after its introduction, this cannot be attributed to a belief that the Library had the right to photocopy copyrighted works, without permission, under existing law.)

(6) The Court of Claims also considered it significant that in 1939 Dr. Putnam "was honored by the American Council of Learned Societies because (among other things) 'You have led in adapting the most modern photographic processes to the needs of the scholar, and have * * * made widely available for purposes of research copies of your collections * * *'". Pet. App. 10. The Court's apparent inference that Dr. Putnam believed it permissible to photoduplicate copyrighted books and journals without permission is, again, unsupported. It is equally, if not more, logical to assume that the praise was directed (a)

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* The use of "ordinarily" did not imply exceptions to the principle that the Library would not duplicate copyright materials without consent. It is explained, instead, by a subsequent reference in the same source (p. 9) to the fact that the Library had "compiled a substantial list of blanket copyright releases from newspaper and magazine publishers" which permit, "under certain conditions, the reproduction of copyrighted material for official or public use without specific correspondence with the copyright proprietor in each case". See also, Annual Report of the Librarian of Congress for the Fiscal Year Ending June 30, 1948 at 46.

to Dr. Putnam's efforts in establishing the Library's Photoduplication Service (which has traditionally refused to duplicate copyrighted works without permission); and/or (b) to his efforts in acquiring for the Library's collections facsimile copies of foreign materials (which might well have been in the public domain in this country, or secured with permission). See Putnam, American Research Libraries in Relation to Scholarly Studies (Lib. of Cong. pamph. 1929).

* * * * * *

Since at least 1941 the Library of Congress has announced a policy of refusing to photoduplicate copyrighted works without permission of the copyright owner. *Amici* concede that on this documentary record it is impossible to accurately determine the Library's policy at the inception of the 1909 Copyright Act; they submit, however, that the Court of Claims' inference that the Library freely photocopied copyrighted material without permission at that time is entirely unjustified.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,

Petitioner,

v.

THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF OF ASSOCIATED COUNCILS OF THE ARTS, *AMICUS CURIAE*

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TABLE OF CONTENTS

	PAGE
Interest of the *Amicus Curiae*	1
Preliminary Statement	3
Summary of Argument	3
ARGUMENT:	
A. The Economic Threat to Creative Artists	4
B. Lack of Legal Distinction for Copyright Purposes Between Scientific and Artistic Works	5
C. The "Fair Use" Doctrine as Applied to Library Practice	8
Conclusion	11

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MacMillan Co. v. *King*, 233 Fed. 864 (D. Mass. 1914)	7
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PAGE

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BRIEF OF ASSOCIATED COUNCILS OF THE ARTS, *AMICUS CURIAE*

Interest of the *Amicus Curiae*

Associated Councils of the Arts, Inc. (hereinafter "ACA") is a national membership organization of state and community arts agencies devoted to the protection and advancement of the arts and artists. It represents several hundred widely diverse organizations, ranging from The Metropolitan Opera, to the Alaska State Council on the Arts, to the Fine Arts Council of Florida, to the Siouxland Arts Council in Sioux City, Iowa. ACA is concerned with all of the problems that affect artists, art institutions and the general public's enjoyment of artistic and cultural works.

ACA acts as a service agency for its members, providing information and assistance to arts councils and arts organizations throughout the United States. ACA member organizations reflect all artistic disciplines and ACA speaks for the management and financial sides of the art world, as well as the creative and innovative artists themselves. Finally, ACA speaks for the arts consumers—those who enjoy art, buy art, view art, and attend the performing arts—in short all who are concerned and affected by the cultural environment of this country.

ACA has recently formed a new action group known as Advocates for the Arts (hereinafter "Advocates"). The Advocates program aims to identify, through factual and legal research, areas in which legal action might have a material affirmative impact on the rights of arts institutions and individual artists, and areas in which legal action might contribute to the enhancement of the cultural life of the community. Advocates intends to act with respect to these areas through public education, drafting of model legislation and litigation. By participation in litigation, Advocates seeks to accomplish both a viable result in the specific litigation, and the sharpening of public consciousness of the way in which the law affects our cultural life and determines the aesthetic character of our surroundings.

Advocates has identified several areas of immediate concern. One of these areas relates to the economic rights of the creative artists. It is the belief of ACA that the decision below presents a grave threat to such economic rights. If respondent prevails, a legal precedent will be set for reproduction and distribution, by modern technological methods, of literary works of creative artists, without compensation to those artists. ACA is concerned that artists not be deprived of the opportunity to maintain an adequate economic existence, thus permitting them to engage in their artistic activities. ACA believes its position to be consistent with the "Sciences and useful Arts" provision of

the Constitution of the United States and with the Copyright Law of 1909. Accordingly, ACA submits this brief *amicus* to urge reversal of the decision below.

Preliminary Statement

The facts of this case have been summarized fully in petitioner's brief. The legal question addressed to this Court is whether systematic library reproduction and distribution of copyrighted journal articles in their entirety constitutes fair use, or copyright infringement. Since ACA is concerned with the economic well-being of creative artists, this brief will be directed to only the following two issues:

(1) Can a distinction be made, as a matter of law, between library use of scientific journal articles, such as those involved in the case at bar, on the one hand, and literary and other works of creative artists on the other?

(2) Should libraries be permitted to employ modern technological methods to extend and enhance their traditional function of making works available to the public to the detriment of the rights of creative artists under the Copyright Law?

Summary of Argument

1. Library photocopying and distribution of the work of creative artists will adversely affect the ability of artists to receive royalty income on which they depend and to which they are entitled.

2. There is no legal distinction between the photocopying and distribution of scientific journal articles and that of other creative artistic works. A decision in favor of the respondent will necessarily be construed to permit photocopying and distribution of artistic works to the economic detriment of artists.

3. The extension of the "fair use" doctrine to permit wholesale reproduction and distribution by libraries of copyrighted material is contrary to the purpose and language of the Copyright Law and gives special license to "libraries," without legal justification, to infringe on the economic rights of creative artists.

ARGUMENT

A. The Economic Threat to Creative Artists.

The Court below has so applied the copyright "fair use" doctrine as to encourage wholesale library reproduction and distribution of copyrighted works. Those who create artistic works are necessarily threatened. Without copyright protection against unauthorized distribution by libraries of photocopies of their works, creative artists can have no assurance of being paid for their efforts.

If an article from a scientific journal can be reproduced and distributed, why cannot a short story or a poem from a literary magazine also be reproduced and distributed? Why not a musical composition from a workbook of musical scores? Indeed, why not a photograph or a drawing or a lithograph from a photographic magazine or a magazine anthology of art reproductions or lithographs? Why should the library be limited to magazines? Why should it not be permitted to reproduce the same poem, short story, musical composition, photograph, drawing, or lithograph from a paperback book or a hardcover book? Further, it would seem to make no difference, as a matter of law, whether the literary or artistic work is extracted from a collection of works by a single poet, short story writer, composer, photographer, painter, or lithographer, or from an anthology of works by many artists. In either case, an entire creative work would seem to be just as subject as an entire article from a scientific journal to photo-

copying and mailing by libraries to members of the general public. Instead of coming to the library personally to borrow and read the work, the library will give to the "borrower" a permanent personal copy.

However, the composer, poet and the short story writer are directly economically dependent on royalty income, based on the sale of their works to those who desire permanent personal copies. The photographer, the painter, and the lithographer jealously reserve reproduction rights to their works and expect to be paid when they authorize reproduction by or for those who desire permanent personal copies.

If libraries will provide copies of specific works by creative artists upon request, why should anybody buy the entire magazine or paperback or hardcover book containing that specific work? Necessarily, publishers will sell fewer magazines and books, artists will receive less royalty income, and their works will be widely reproduced and distributed without authorization from them or compensation to them.

B. Lack of Legal Distinction for Copyright Purposes Between Scientific and Artistic Works.

It may be contended that the decision below does not necessarily threaten the economic rights of creative artists because it can be limited to the distribution of information significant to scientific research. Indeed, the majority decision below stresses the fact that the copyrighted articles in question were copied and distributed in the interests of advancing medical science, and suggests that the decision is a narrow one.

> "[O]ur holding is restricted to the type and content of use by NIH and NLM, as shown by this record. That is all we have before us, and we do not pass on dissimilar systems or uses of copyrighted materials

> by other institutions or enterprises, *or in other fields*, or as applied to items other than journal articles, or with other significant variables." 487 F.2d 1345, 1362.

This suggestion that the unauthorized reproduction and distribution of copyrighted articles on subjects of scholarly scientific interest may be more permissible than similar reproduction and distribution of other copyrighted works is wholly without legal basis. There is no legal warrant for permitting one university professor to receive a copy of a scientific article, while denying another university professor a copy of a poem or short story or drawing.

Article 1, Section 8 of the United States Constitution provides that:

> "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries."

The enactment of the Copyright Law (17 USC) was in furtherance of the constitutional purpose of promoting Science and the useful Arts and in compliance with the constitutional mandate of granting to all authors the exclusive rights to their works. The specific purpose and intent of the copyright law is " 'to give to authors the exclusive right to' the productions of their brains when reduced to the form of writings." *Ginn* v. *Apollo Pub. Co.,* 215 Fed. 772, 778 (E.D. Pa. 1914).

Nowhere in the constitutional provision is there any indication of intention to distinguish between scientific writing and other creative works. Indeed, the term "science," as used at the time when the Constitution was drafted, referred to the general knowledge of society, and not merely the physical sciences. Oxford English Dictionary 2668 (Compact Ed. 1971).

The Copyright Law likewise indicates no intention to distinguish between types or fields of writing, or of use of copyrighted material. All of the relevant cases hold directly to the contrary. In *MacMillan Co.* v. *King,* 223 Fed. 864 (D. Mass. 1914), the Court rejected the argument that copyright infringement was justified because of the use of the material. Specifically, the Court found a teacher's one page lesson plans to constitute a copyright infringement because they contained short phrases, usually no more than a sentence, derived or quoted from a copyrighted work. The Court stated:

> "If the above conclusions are right, I am unable to believe that the defendant's use of the outlines is any the less infringement of the copyright because he is a teacher, because he uses them in teaching the contents of the book, because he might lecture upon the contents of the book without infringing, or because his pupils might have taken their own notes of his lectures without infringing." 223 Fed. at 867.

Nearly half a century later, in *Wihtol* v. *Crow,* 309 F. 2d 777 (8th Cir. 1962), a school choral instructor (who was also a church choral director) was found to have infringed the plaintiff's copyright by incorporating the plaintiff's song in a new arrangement, duplicating the arrangement 48 times and having it performed *one* time by the 84 voice school chorus and *one* time by the much smaller church choir. In its discussion of fair use, the Court stated:

> "Whatever may be the breadth of the doctrine of 'fair use,' it is not conceivable to us that the copying of all, or substantially all, of a copyrighted song can be held to be a 'fair use' merely because the infringer had no intent to infringe . . . It must be kept in mind that the applicable law is purely statutory and that the Copyright Act has little elasticity or flexibility." 309 F. 2d at 780-81.

In both cases, notwithstanding an educational use, directed to the dissemination of knowledge in accordance with the purpose of the constitutional mandate, the copying was held to be an infringement. It is apparent from these and other cases [*Ginn* v. *Apollo Pub. Co., supra; Sampson & Murdoch Co.* v. *Seaver-Redford Co.*, 140 Fed. 539 (1st Cir. 1905)], that neither the kind of material nor the "use" to which the material is put is the touchstone. Where "the copy of all, or substantially all" of a copyrighted work is involved (*Wihtol* v. *Crow, supra*) it has never been suggested, prior to the decision below, that the educational—or "scientific"—use of the material justifies copyright infringement.

Accordingly, notwithstanding the Court's disclaimers, the decision below has the necessary effect of construing the Copyright Law as it applies to *all* works. If the decision is not reversed, it can be predicted with reasonable certainty that libraries will assert the right to reproduce and distribute, through modern technological means, all copyrighted works—including literary and other artistic works.

C. The "Fair Use" Doctrine as Applied to Library Practice.

The "fair use" doctrine is a judicially created exception to the copyright holder's exclusive right to print, reprint, publish, copy and vend the copyrighted work. Enunciated as early as 1841 in *Folsom* v. *Marsh*, 9 Fed. Cas. Case No. 4,901 (C.C.D. Mass.), the doctrine was justified on the basis that the constitutional policy of promoting science and useful arts should not be completely stifled by the exclusive privileges granted by the Copyright Law. Note, 39 Notre Dame Lawyer 161 (1964). However, in developing the fair use doctrine, the courts have been careful to avoid trampling the rights of copyright holders by depriving them of just compensation. " 'Where the unauthorized copying displaces what realistically might have been a sale, no matter how minor the amount of money involved, the interests of the copyright owner need protection.' " *Sym-*

posium, Can Copyright Law Respond to the New Technology?, 61 Law Library J. 387, 403 (1968) (hereinafter cited as "Symposium").

The question of who is the user of the material is irrelevant. Nimmer, Law of Copyright § 145 (1974); Note, 34 U. Cin. L. Rev. 72 (1965). In determining whether a particular infringement was "fair use," the Courts have asked only whether the duplicate copy might diminish the demand for the original and thus deprive the copyright holder of economic benefits to which he otherwise would have been entitled. Nimmer, *supra*. This approach has always heretofore provided the creative artist with a sense of security and economic control over his copyrighted works. The decision below threatens that position.

It is submitted that the Court below did not give adequate consideration to the implications of its decision. Instead, it approached the case at bar as if it involved only a slight expansion of the "fair use" doctrine already applicable to traditional library lending practices. In fact, reproduction and distribution of copyrighted works in their entirety by modern technological methods has nothing to do either with "fair use" or traditional library practices.

Traditionally, the function of libraries has been to provide access to information by lending the original book or magazine to the borrower. For the most part, it was impractical to make a copy of an original work and give it to the user as a permanent personal copy. *Symposium, supra*, at 387. The occasional photostating or handcopying of a copyrighted work by a scholar, or portion of a book or a poem by a creative artist did not cause concern to the scholar or the creative artist, since it had virtually no effect on sales of the original work. Varmer, "Photoduplication of Copyrighted Material by Libraries," Study No. 15, Copyright Law Revision Studies Prepared for Senate Committee on the Judiciary, 86th Cong., 2d Sess. 53 (Comm. Print 1960).

However, there has been a revolution in reproduction techniques; and these new techniques are still in the process of development. Libraries are now able to photocopy inexpensively not only articles from scientific journals, but articles from literary journals, short stories, poems, photographs and reproductions of drawings and lithographs. As cheap color reproduction techniques become perfected, libraries will be able to provide prints of art works from art books by living artists. The fact that it is a library which reproduces and distributes such work will give no comfort or economic support to the creative artist.

The photocopying activities of the respondent are but the first step in the reprography revolution. Should these activities be permitted to continue without regard to the rights of copyright owners, it would not be difficult to foresee a time when but one copy of a poem or short story or even a novel need be published and be readily made available to all free of charge. *See Symposium, supra.*

The decision below arouses these concerns because it expands the fair use concept into areas of infringement that Congress clearly intended to prohibit by the Copyright Law. Although, as a general rule, a statute may be construed to take account of changes in technology, the copyright statute "ought not to be unduly extended by judicial construction to include privileges not intended to be conferred . . . ." *Bobbs-Merrill Co.* v. *Straus*, 210 U.S. 339, 346 (1908). *See, also, Jerome H. Remick & Co.* v. *American Auto. Accessories Co.*, 5 F. 2d 411 (6th Cir. 1925), *cert. den.* 269 U.S. 556. At the time of the 1909 Copyright Law, Congress was fully aware of the fair use doctrine and its implications. It had been enunciated at least sixty-eight years earlier. The revolutionary change that has occurred in the field of reprography could in no way have been contemplated by Congress to be within the realm of fair use. If wholesale photocopying of works in their entirety is to be permitted, it should be

by Congressional action, not by judicial expansion of the fair use doctrine to a point where the economic rights of creative artists are threatened.

CONCLUSION

We respectfully submit that the decision below unreasonably extends the "fair use" doctrine and gives a license for copyright infringement in the guise of library lending. Reproduction and distribution on a substantial scale of entire articles from copyrighted magazines constitute copyright infringement, no matter who engages in the practice, and no matter the educational or scientific purpose purportedly being served.

As a legal matter, there is no more justification for reproduction and distribution of an entire article from a copyrighted scientific magazine to a university researcher, than there is for reproduction and distribution of a poem or short story from a copyrighted literary magazine to a university English professor for use in his English class. Accordingly, the decision below represents a real threat to the creative artist who depends for his economic livelihood on reservation of reproduction rights and royalty income.

ACA therefore respectfully urges that the decision below be reversed, and the purpose of the Copyright Law—the protection of the creative artist—be reaffirmed.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY, *Petitioner*,

—against—

THE UNITED STATES, *Respondent*.

On Writ of Certiorari to the United States Court of Claims

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION, AMICUS CURIAE, IN SUPPORT OF RESPONDENT

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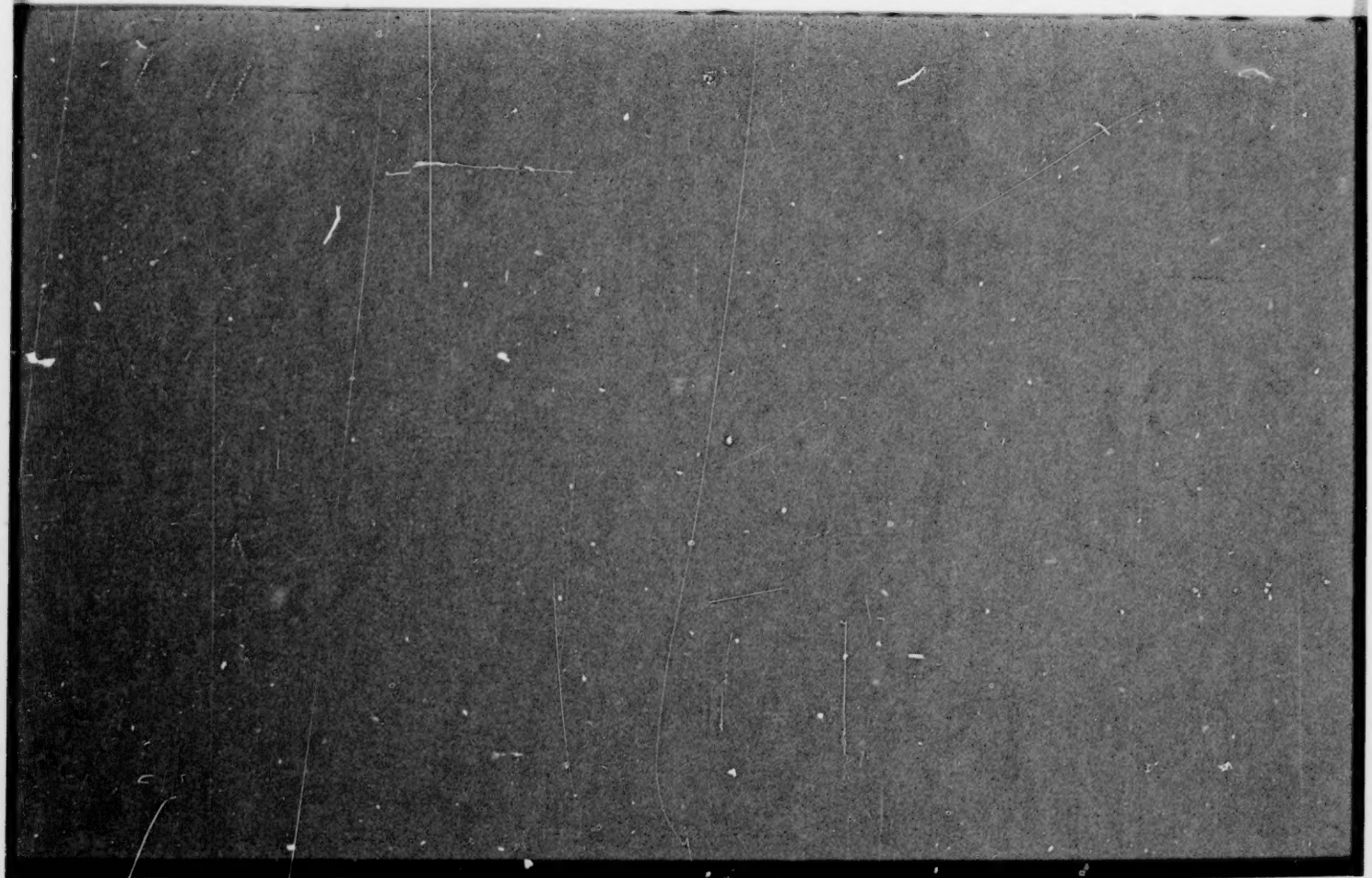

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

QUESTIONS BEFORE THE COURT 2

INTEREST OF THE NATIONAL EDUCATION ASSOCIATION ... 3

ARGUMENT 11

I. CONSTITUTIONAL ISSUES 11

At the Heart of the Case 11

Need for Constitutional Decision 12

A. *The Constitution Grants No Rights to Copyright Proprietors,* but Merely Gives Congress the Discretion to Legislate on Copyright Within Specified Limits 14

B. *The First Amendment Protects the American People's Reasonable Access to Matter Subject to Copyright* 17

1. *Freedom of Press Protects the American People Not Publishers* 18

2. *The Right of Access* Is an Integral Part of the Rights Guaranteed by the Bill of Rights 21

3. *The Rights of Free Press and Free Speech* Include the *Right to Read* 22

4. *The First Amendment* Protects the Student's *Right to Learn* 29

5. *The First Amendment Protects the Freedom of Teachers and Students to Reasonable Access to Copyrighted Materials* 30

C. *The Ninth Amendment* Protects the Rights of Americans to Knowledge and *To Read.* The Respondent's Practice Here Comes Within the Penumbra of the Ninth Amendment 32

Page

D. *The Constitution Is a Living Document* 37

E. *In "Balancing" Interests,* Courts Must Give Priority to the Constitutional Protection of thePublic Interest (for Reasonable Access) Over the Statutory Privilege of a Copyright Proprietor 43

1. Primacy of the Public Interest in Copyright Law 45

2. Copyright Monopoly Must Be Strictly Construed 47

F. *The Burden of Proof is on the Copyright Proprietor* to Show That an Alleged Infringement is not Protected by the First or Ninth Amendments 51

II. Customary Use Is "Fair Use" Under the Copyright Law 52

A. Custom and the Common Law 52

B. Custom and "Fair Use" 54

C. The Evidence Shows Custom Prevailed Here 57

D. Common Sense Approach 60

III. Conclusion 62

TABLE OF AUTHORITIES

Cases:

Adams Exp. Co. v. Ohio State Auditor, 166 U.S. 185 (1897) 61
ACLU v. Radford, 315 F. Supp. 893 (E. D. Va. 1970) 22
AFL v. Swing, 312 U.S. 321 (1941) 41
American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907) 15
Appalachian Coals Inc. v. U.S., 288 U.S. 344 (1933)... 40
Application of Cooper, 254 F.2d 611 (C.C.P.A. 1958), *cert. den.* 358 U.S. 840 (1958) 16
Ashwander v. TVA, 297 U.S. 288 (1936).....34, 35, 51
Associated Press v. U.S., 326 U.S. 1 (1945) 14, 18

Page

Bentley v. Tibbals, 223 F. 247 (2d Cir. 1915) 15
Berlin v. E. C. Publications Inc., 329 F.2d 541 (2d Cir. 1961), *cert. den.* 379 U.S. 822 46
Board of Education v. Barnette, 319 U.S. 624 (1943) 30
Bobbs-Merrill Co. v. Strauss, 210 U.S. 339 (1908) 15
Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. den.* 398 U.S. 937 (1970) 35
Bridges v. California, 314 U.S. 252 (1941) 42
Brooks v. Auburn University, 412 F.2d 1171 (5th Cir. 1969) 22
Brown v. Board of Education, 347 U.S. 483 (1954) 6, 38
Butler v. Michigan, 352 U.S. 380 (1957) 23, 24
California v. LaRue, 409 U.S. 109 (1972) 36, 44
California Motor Transport Co. et al. v. Trucking Unlimited, 404 U.S. 508 (1972) 21
Caliga v. Inter Ocean Newspaper Co., 215 U.S. 182 (1909) 15
Chapman v. U.S., 365 U.S. 610 (1961) 41
Coleman v. Alabama, 399 U.S. 1 (1970) 38
Colgrove v. Bettin, 413 U.S. 149 (1973) 38
Communist Party v. Catherwood, 367 U.S. 389 (1961) 12
Conner v. Long, 104 U.S. 228 (1881) 38, 39
Cooper v. Aaron, 359 U.S. 1 (1958) 38
Cruz v. Beto, 405 U.S. 319 (1972) 21
Cummings v. Missouri, 4 Wall. 277 (1866) 42
Deepsouth Packing Co., Inc. v. The Laitram Corp., 406 U.S. 518 (1972) 16, 48
Dennis v. U.S., 341 U.S. 494 (1951) 12, 62
Dodsley v. Kinnersley, 27 Eng. Rep. 270 (1761) 54
Erie v. Tomkins, 304 U.S. 64 (1938) 38
Folsom et al. v. Marsh et al., 9 Fed Cas. 342, No. 4901 (1811) 44
Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968) 46, 48, 62
Foti v. Immigration and Naturalization Service, 375 U.S. 217 (1963) 59
Fox Film Corp. v. Doyal, 286 U.S. 123 (1932) 15, 47
Furman v. Georgia, 408 U.S. 238 (1972) 38
In re Gault, 387 U.S. 1 (1967) 30
Goldstein et al. v. California, 412 U.S. 546 (1973) 17
Graham v. John Deere, 381 U.S. 1 (1966) 48, 49
Grant v. Kellogg Co., 58 F.Supp. 48 (S.D.N.Y. 1944), *aff'd* 154 F.2d 59 (2nd Cir. 1946) 15

Page

Grayned v. City of Rockford, 408 U.S. 104 (1972)..... 14
Greenbie v. Noble, 151 F.Supp. 45 (D.C.N.Y. 1957).... 46
Griswold v. Connecticut, 381 U.S. 479 (1965) ..23, 32-34, 37
Grosjean v. American Press Co., 297 U.S. 233 (1936) 19, 22, 42
Guinn v. U.S., 238 U.S. 347 (1915)..... 42
Healy et al., v. James et al., 408 U.S. 169 (1972)..... 28
Hobson v. Hanson, 269 F.Supp. 401 (1967), *app. dism'd* 393 U.S. 801 (1969) 29
Holdredge v. Knight Pub. Corp., 214 F.Supp. 921 (D.C. Calif. 1963) 54
Hurtado v. California, 110 U.S. 516 (1884)..... 39
International Association of Machinists v. Street, 367 U.S. 740 (1961) 12
Johnson v. Louisiana, 406 U.S. 404 (1972) 38
Katz v. U.S., 389 U.S. 347 (1967)..... 40
Keene v. Wheatley, 14 Fed. Cas. 180, No. 7644 (Cir. Ct. Pa. 1820) 16
Kent v. Dulles, 357 U.S. 116 (1958) 13
King v. Saddleback Jr. Col. Dist., 445 F.2d 932 (9th Cir. 1971), *cert. den.* 404 U.S. 979 (1971)..... 35
Kingsley Books, Inc., v. Brown, 354 U.S. 436 (1957).. 31
Kleindienst v. Mandel et al., 408 U.S. 753 (1972)..21, 23, 25, 26, 27, 30, 43-44
Konigsberg v. State Bar of California, 366 U.S. 36 (1961) 40
Kraft v. Cohen, 117 F.2d 579 (3rd Cir. 1941) 16
Lamont v. Postmaster General, 381 U.S. 301 (1965) 21, 23, 24, 26, 27
Lane v. Wilson, 307 U.S. 268 (1939)..... 42
Lee et al. v. Bunge, 404 U.S. 887 (1971)..... 49
Local Landmarks v. Price, 170 F.2d 715 (5th Cir. 1948) 15
Loew's Inc. v. C.B.S., 131 F.Supp. 165 (1955), *aff'd* 239 F.2d 532 (9th Circ. 1956), *aff'd* by equally divided court, 356 U.S. 43 (1958) 15
Louisiana ex rel Gremelion v. NAACP, 366 U.S. 293 (1961) 42
Louisville Bank v. Reedford, 295 U.S. 555 (1935)..... 36
Lovell v. Griffin, 303 U.S. 444 (1938) 22
Marsh v. Alabama, 326 U.S. 501 (1946)..... 22
Martin v. City of Struthers, 319 U.S. 141 (1943) 21, 22, 25, 27

Page

Matter of Jackson, 96 U.S. 727 (1878) 22, 23
Mazer v. Stein, 347 U.S. 201 (1954) 15, 45, 50
Merchant's Bank v. State Bank, 10 Wall. 604 (1870) .. 53
Meyer v. Nebraska, 262 U.S. 390 (1923) 29
Miller Music Corp. v. Daniels, Inc., 362 U.S. 373 (1960) 15
Millikin et al. v. Bradley et al., 418 U.S. , 42 LW 5249 (1974) 59
Missouri v. Holland, 252 U.S. 416 (1922) 39
Molpus v. Fortune, 432 F.2d 916 (5th Cir. 1970) 22
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 12, 31
N. Y. Times v. Sullivan, 376 U.S. 254 (1964) 22
N. Y. Times, Inc. v. U.S., 403 U.S. 713 (1971) 23
Nicoll v Pittsvein Coal Co., 269 F. 968 (2d Cir. 1920) 53
Olmstead v. U.S., 277 U.S. 438 (1929) 40, 42
Orient Ins. Co. v. Daggs, 172 U.S. 557 (1869) 62
Peak v. U.S., 353 U.S. 43 (1957) 60
Peters v. Hobby, 349 U.S. 331 (1955) 13
Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) 61
Pickings v. Bruce, 430 F.2d 595 (6th Cir. 1970) 22
Poe v. Ullman, 367 U.S. 497 (1961) 31, 33, 41
Procunier v. Martinez, 416 U.S. , 94 S. Ct. 1800, (1974) 21, 24, 28
Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969) 21, 23, 25
Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) 13
Roe et al. v. Wade, 410 U.S. 113 (1973) 38
Rosemount Enterprises Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), *cert. den.* 385 U.S. 1009 ..... 46, 54
Saunders v. Smith, 40 Eng. Rep. 1100 (1838) 55
Scales v. U.S.A., 367 U.S. 203 (1961) 13
Schneider v. State, 308 U.S. 147 (1939) 19
Senior v. Braden, 295 U.S. 422 (1935) 61
Serrano v. Priest, 5 Cal. 3d 584 (1971) 29
Shapiro, Bernstein & Co., Inc. v. P. F. Collier and Son Co., 26 U.S.P.Q. 40 (S.D.N.Y. 1939) 54
Shelton v. Tucker, 364 U.S. 479 (1960) 30
Silverman v. U.S., 365 U.S. 505 (1961) 46
Smith v. Univ. of Tennessee, 300 F.Supp. 777 (E. D. Tenn. 1969) 22
Snyder v. Bd. of Trustees, 286 F.Supp. 927 (N.D. Ill. 1968) 22

Page

Speiser v. Randall, 357 U.S. 513 (1958) 42
Stanley v. Georgia, 394 U.S. 557 (1969) ...21, 23, 24, 25, 27
State v. Abellani, 50 Haw. 384 (1968) 34
State of Illinois v. City of Milwaukee, 406 U.S. 91 (1972) 63
State of Wisconsin v. Yoder et al., 406 U.S. 205 (1972) 43
Stuff v. La Budde Feed and Grain Co., 42 F.Supp. 493 (E.D. Wis. 1941) 16
Sweezy v. New Hampshire, 354 U.S. 234 (1957)..... 31
Teleprompter Corp. v. C.B.S., 415 U.S. 394 (1974).... 48
Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) 63
Thomas v. Collins. 323 U.S. 516 (1945) 22, 25
Time, Inc. v. Hill, 385 U.S. 374 (1965) 19
Times Film Corp. v. Chicago, 365 U.S. 43 (1961)....30, 31
Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969).. 30
U.S. v. Loew's, Inc., 371 U.S. 38 (1962)..... 45
U.S. et al. v. Midwest Video Corp., 406 U.S. 649 (1972) 49-50
U.S. v. Nixon, 418 U.S. , 42 LW 5237 (1974) 38
U.S. v. Paramount Pictures, Inc., 334 U.S. 131 (1948) 45
U.S. v. Powell, 171 F.Supp. 202 (N.D. Calif. 1959)... 19
U.S. v. Robel, 389 U.S. 258 (1967)..... 43
U.S. v. Rumeley, 345 U.S. 41 (1953) 12, 42
U.S. v. U.S. Gypsum Co., 333 U.S. 364 (1948)..... 13
U.S. ex rel. Milwaukee Pub. Co. v. Burleson, 255 U.S. 407 (1931) 42
U.S. Shipping Board v. Levensaler, 290 F. 297 (C.A.D.C. 1923), *cert. den.* 266 U.S. 630 (1924) ... 53
Vanston Bondholders Prot. Com. v. Green et al., 329 U.S. 156 (1946) 2
Volansky v. U.S., 246 F.2d 842 (6th Cir. 1957)..... 13
Weems v. U.S., 217 U.S. 349 (1910) 41
Wheaton v. Peters, 8 Pet. 591 (1834).....14, 15, 16, 54
White-Smith Music Pub Co., v. Apollo, 147 F. 226 (2d Cir. 1906), *aff'd* 209 U.S. 1 (1908)..... 15
In re Winship, 397 U.S. 358 (1970)..... 30
Winters v. New York, 333 U.S. 507 (1948).....22, 23
Wright v. Emporia City Council, 407 U.S. 451 (1972) 13, 14
Yakus v. U.S., 321 U.S. 414 (1944) 2
Younger v. Gilmore, 404 U.S. 15 (1971) 21
Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952) 13
Zenger Case 22

Page

CONSTITUTION:

Article I, Section 8 (Copyright Clause) 3, 5, 6, 12, 14, 17
First Amendment 2, 11, 12, 14, 17, 18, 22-23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 40-43, 47, 51-52
Sixth Amendment 30
Seventh Amendment 38
Eighth Amendment 38
Ninth Amendment 2, 11, 12, 30, 32-37, 51-52
Fourteenth Amendment 21, 23
Twenty First Amendment 36-37

STATUTES AND CONGRESSIONAL REPORTS:

Copyright Act of 1790, 1 STAT. c. 15 16
Copyright Act of 1909 .....12, 16-17
House Rep. No. 2222, 60th Cong., 2nd Sess. 15, 45
House Rep. No. 1742, on H. J. Res. 676, 87th Cong., 2nd Sess. (May 2, 1962) 47
House Jud. Comm., H. Rep. No. 2237, 89th Cong., 2nd Sess. 7, 9
House Jud. Comm., H. Rep. No. 83, 90th Cong., 1st Sess. 7, 8
Sen. Jud. Comm., S. Rept. No. 93-983, 93rd Cong., 2nd Sess. 7, 8, 9
30 STAT. 805 (June 30, 1906) 3

BOOKS AND ARTICLES:

BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY (1944) 55
BLACKSTONE, COMMENTARIES 53
CARDOZO, NATURE OF THE JUDICIAL PROCESS (1921)..... 40
PARADOXES (1928) 31
Case Note, 15 So. CALIF. L. REV. 249 (1942) 56
Chafee, *Reflections on the Law of Copyright: I,* 45 COL. L. REV. 503 (1945) 24, 44
Clapp, *Can Copyright Law Respond to the New Technology,* 64 LAW LIBRARY J. 387 (No. 4, Nov. 1968) .58-60
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Page

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DE WOLF, AN OUTLINE OF COPYRIGHT AND LITERARY PROPERTY (1944) 55
DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS (1879) 55, 62
Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COL. L. REV. 527 (1947) 40
Frost, "The Gift Outright" 5
Garner, *The Ninth Amendment* (Comment), 30 ALBANY L. REV. 89 (1966) 36
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HOLLAND, THE ELEMENTS OF JURISPRUDENCE (1910).... 53
Holmes, *The Path of the Law*, 10 HARV. L. REV. 458 (1887) 44, 45
THE COMMON LAW (1881) 52
Hudon, *The Copyright Period: Weighing Personal Against Public Interest*, 49 A.B.A.J. 759 (1963)... 47
KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT (1967).... 48
Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L. J. 309 (1936) 35
Kutner, *The Neglected Ninth Amendment: The 'Other Rights' Retained by the People*, 51 MARQ. L. REV. 121 (1968) 34
LECKY, HISTORY OF THE RISE AND INFLUENCE OF THE SPIRIT OF RATIONALISM IN EUROPE (1865) 41
MCCORMICK, THE CASE FOR FREEDOM OF THE PRESS (1933) 20
McDonald, *Non-Infringing Uses*, 9 BULL. OF COPYRIGHT SOCIETY OF U.S.A. 466 (Aug. 1962) 56
MCKEON, MERTON & GELLHORN, THE FREEDOM TO READ (1957) 22
Madison, *The Federalist*, No. 37, at 236 64
MAIMONIDES, THE GUIDE OF THE PERPLEXED..... 39

Page

Milton, *Areopagitica* 22
New Technology and the Law of Copyright: Reprography and Computers, 15 U.C.L.A. L. Rev. 939 (1968) 8
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Nimmer on Copyrights, (1972) 16, 51, 57
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Sulzberger, Arthur, Nov. 13, 1956 (privately printed) 19, 20
Weil, American Copyright Law (1917) 55
Williston on Contracts Sec. 649 .....56, 57

Miscellaneous:

Adams, S., testimony 59
American Guild of Authors and Composers, *et al.,* Brief *Amicus* 9-10
Association of Research Libraries, etc., Brief *Amicus Curiae* 58
Cummings, M. M., testimony 58
Gentlemen's Agreement (1935) 60-61
Halsbury's Laws of England (3d ed. 1955), Vol. II, p. 158 55
Heumann , K. F., testimony 58
Magazine Publishers Association, Inc., Brief *amicus curiae* 10
National Education Association, resolution 4
Congressional charter, 30 Stat. 805 3
Petitioner's Brief 10

Page

Register of Copyrights—Copyright Law Revision, *Report of the Register of Copyrights*, House Com. Print, 87th Cong., 1st Sess. (July 1961) 45-46
Brief *Amicus* 50

Transcript, T. 459-1 ..... 57, 58
T. 836 58
T. 837-8 59

U. S., exhibits 58, 61

IN THE

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OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY, *Petitioner*,

—against—

THE UNITED STATES, *Respondent*.

On Writ of Certiorari to the United States Court of Claims

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION, AMICUS CURIAE

With the consent of both parties, the National Education Association of the United States respectfully submits this brief *amicus curiae* in support of the Respondent.

The letters of consent have been filed with the Clerk of this Court.

QUESTIONS BEFORE THE COURT

"Putting the wrong questions is not likely to beget right answers even in law", according to Mr. Justice Frankfurter.[1] And Mr. Justice Rutledge once said:

> "To state the question often is to decide it. And it may do this by failure to reveal fully what is at stake."[2]

Amicus respectfully suggests that the Petitioner has put "the wrong question" before this Court, and that its question fails "to reveal fully what is at stake."

Amicus believes that the dispositive questions are as follows:

1. *Constitutional*

   Does "fair use" have constitutional protection under the Bill of Rights?

2. *Custom and "Fair Use"*

   Is a customary use a "fair use", without regard to the normally applicable criteria used in the absence of such custom?

Amicus respectfully suggests that the answer to these questions is as follows:

1. *Constitutional*

   "Fair use" has constitutional protection under both the First and Ninth Amendments. Reasonable resort to this protection has priority over the mere privilege accorded to the copyright

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[1] *Vanston Bondholders Prot. Com.* v. *Green et al.*, 329 U.S. 156, 170 (1946) (concurring).

[2] *Yakus* v. *U. S.*, 321 U.S. 414, 482 (1944) (dissenting).

owner by permissive and non-mandatory action of the Congress under the copyright clause of Article I, § 8.

2. *Custom and "Fair Use"*

A customary use *is* a fair use, without need for compliance with criteria which are applicable and necessary where custom is not involved.

THE INTEREST OF THE NATIONAL EDUCATION ASSOCIATION

The decision of the Court below has implications which seriously affect millions of teachers and multiple-millions of students in America's schools. If the decision of the Court of Claims is not allowed to stand, it could well limit the capacity of the American school system to teach effectively. While the case before the Court involves library activities, in the broad reach those activities are educational in nature.

The National Education Association of the United States (incorporated under a statute of the Congress) is the largest professional organization in the United States. With the combined membership of its State and local affiliates, the NEA represents approximately two million of the nation's educators, with elementary and secondary classroom teachers and college professors making up about 90% of its membership.

The NEA is an independent, voluntary, nongovernmental organization whose Congressional charter designates its purpose as "to elevate the character and advance the interests of the profession of teaching and to promote the cause of education in the United States," 30 STAT. 805, Section 2 (June 30, 1906). To further this end, it strives for the improvement of the professional status of teachers.

NEA's interest in the copyright law is of long standing. For example, in 1963, it was instrumental in creating an *Ad Hoc Committee on Copyright Law Revision*, which includes representatives of some 42 educational organizations covering the full range of education in the United States. This independent committee has been chaired by an NEA staff member. The group meets regularly to study proposed copyright legislation and to make recommendations to the Congress in behalf of the public interest.

The NEA's continuing resolution on copyright law revision, passed by the Delegate Assembly in 1971 and readopted annually since then, starts with the following sentence:

> "The National Education Association believes that maximum access to teaching materials is of vital concern to every teacher." 1971-72 NEA HANDBOOK FOR LOCAL, STATE AND NATIONAL ASSOCIATIONS (Oct. 1971), pp. 88-89.

The copyright law affects the teaching process at its inner core. Formerly, teachers tended to use the same textbooks for all pupils. Today's teacher uses many resources in his teaching. He has a variety of texts and supplementary materials, including trade and reference books, newspapers and magazines, educational motion pictures, film strips, audio and video tapes and cartridges, overhead transparency projectors, record players, slides, instructional TV and radio, programmed instructional material, and computer-assisted instruction. The modern teacher uses all of these resources in orchestration to do specific jobs. He selects resources to fit particular learner needs and objectives.

The most effective teachers are those who capture the mood of the moment, who use some suddenly discovered

motivation of their pupils at the teachable moment. The copyrighted works most needed by teachers are recent and contemporaneous materials, not text books. Teachers want to update texts and have their classroom work relevant and meaningful to current developments. It is because of such materials and needs, and because of the newer educational technologies, that most of education's copyright problems arise.

Perhaps the most dramatic example of the kind of copyright problems faced by teachers was the reading of Robert Frost's poem, "The Gift Outright", at President Kennedy's inauguration. Many English teachers used it in the immediately following days, to illustrate the value of poetry in capturing the spirit and essence of a key moment in our national consciousness. The poem was copyrighted but not available in any textbook. Should a teacher deprive his students of such a universal national experience because the poem was not in the textbook? For many younger students in American schools this might be the first introduction to one of America's outstanding poets. Obviously, teachers could not have planned ahead for this situation. The copyright problems of teachers are infrequently so dramatically illustrated as with the Frost poem but they occur daily and are critical to meeting the needs of effective teaching.

Would it advance the public interest, would it be consonant with the provisions and purpose of the copyright clause of the Constitution, to lose the teachable moment by waiting for months to get the book through purchase or permission to copy, for a one-time use whose timeliness would long since have disappeared?

NEA believes that immediate use of the Frost poem was a typical educational "fair use" authorized under

the copyright law. Such use is consonant with the Supreme Court's concept of the importance of education today:

> "Today, education is perhaps the most important function of state and local government . . . It is required in the performance of our most basic responsibilities . . . It is the very foundation of good citizenship. Today it is a principal instrument for awakening . . . cultural values, in preparing . . . for later professional training and in helping . . . to adjust normally to his environment."[3]

In more recent times, the resignation of President Nixon presents similar "fair use" problems to teachers using portions of copyrighted newspapers or magazines for the improvement of education without detriment to the publishers.

The NEA believes that the Constitution's copyright clause and the "fair use" doctrine must be interpreted so as to support, not to restrict, good teaching practices, by assuring non-profit and non-commercial educational purposes of a reasonable and ready access to teaching materials. In particular, the opinion below affects two aspects of "fair use" that are of utmost importance to America's pupils and teachers:

(1) the customary and long-established practice of teachers in making limited copies of copyrighted print materials for classroom use and teaching purposes; and

(2) the opportunity to meet instructional requirements through access to copyrighted materials by means of the new educational technologies, such as audio-visual materials, broadcast materials, and others.

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[3] *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954).

Special Problem: Legislation Under Consideration. As already indicated, this case involves more than the customary concern of an *amicus*. The reversal of the decision below may well decide the meaning of pending Congressional legislation for comprehensive copyright revision in a manner wholly inconsistent with the Congressional understanding of the meaning of "fair use" as heretofore interpreted by the courts.

For many years the Congress has been considering proposals for comprehensive revision of the current copyright law which was adopted in 1909. Extensive hearings have been completed in both the House and the Senate. Thus far, only the House has passed a bill. The House Judiciary Committee reported a bill in 1966 (H. Rep. No. 2237, 89th Cong., 2d Sess.); and again in 1967 (H. Rep. No. 83, 90th Cong., 1st Sess.) (A bill is now pending in the Senate, S. 1361, Sen. Rep. No. 93-983.)

The report of the House Judiciary Committee clearly reflects vigorous and controversial debate, during extensive hearings, over the meaning of "fair use" for education. For the first time, the Committee proposed statutory recognition of "fair use". The House report indicated some key factors behind its judgment:

(1) There are no judicial precedents for the meaning of "fair use" in connection with nonprofit schools.[4]

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[4] See also Sen. Rep. No. 93-983, 93rd Cong., 2nd Sess. (1974), p. 116. ". . . the case law on fair use has not dealt with photocopying and the analogous forms of reproduction" for educational purposes. ". . . as to cases of copying by teachers . . . in this area there are few if any judicial guidelines,". House Rep. No. 2237, 89th Cong., 2nd Sess., on H.R. 4347, pp. 60-1. See also statement by Copyright Office's General Counsel: ". . . The decisions have not dealt with copying specifically for the purpose of teaching or

(2) In adopting statutory "fair use", the Committee "intended to restate the present judicial doctrine of fair use", neither augmenting nor constricting it.[5]

(3) To give some guidelines of what such statutorily-adopted judicial "fair use" means, the Committee set forth at length specific examples of school and teaching activities which in its judgment are such "fair use".

The significant fact is that in arriving at such examples, the House Judiciary Committee relied on no judicial precedents and cited none. Instead, virtually all of its examples as to legally acceptable educational "fair use" were adopted substantially, if not in *haec verbi,* from examples which a parade of educational witnesses had described as being the long-standing *custom* of schools and teachers.[6] Thus, we have here a Congressional understanding that judicial "fair use" derives from the *custom followed in schools.*

Amicus respectfully suggests that there is a fundamental inconsistency as to the origin and meaning of "fair use", between the Reports of the House and Senate Judiciary Committees and the Petitioner's position, and that such difference might be crucial to the operability of America's schools. The Petitioner's view undercuts the understanding of the House and

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research. The formulation in the bill does; it cites, as examples of purposes for which copying or other uses might qualify as fair use . . .", Goldman, *Can Copyright Law Revision Respond to the New Technology?*, 64 LAW LIBRARY J. (No. 4, Nov. 1968), 387 at 393.

[5] House Rep. No. 83, 90th Cong. 1st Sess. (1967), p. 32. To same effect: Sen. Rep. No. 93-983, 93rd Cong., 2nd Sess. (1974), p. 116.

[6] See, for example, *New Technology and the Law of Copyright: Reprography and Computers,* 15 UCLA L. REV. 939, 953 (1968).

Senate Judiciary Committees as to the judicial doctrine of "fair use" and therefore vitiates the entire basis for the House's action. The Petitioner's refusal to accept and give effect to customary use as "fair use" runs directly counter to the obvious intent and understanding of the Senate and House Committees in turning to educational custom to describe the judicial "fair use" which it was accepting by statute for educational purposes.

The House Judiciary Committee's report is specifically designed, in part, to protect the educational community of America,[7] by specifying what "fair use" means for the nation's schools. The Petitioner would, on the other hand, negate the substance of that legislative understanding. *Amicus* asks this Court, among other things, to vindicate the basic concept of "fair use" upon which the reports of both Judiciary Committees are based, and which is rejected by the Petitioner, *i.e.*, that customary use *is* "fair use".

What is at stake here, therefore, is not only the future of judicial determinations of "fair use" under the present law but also the meaning, *in futuro*, of comprehensive copyright law revision so far as it intimately affects America's schools.

In one respect, The National Education Association agrees with comments made by several *amici curiae* in support of the Petitioner on the Petition for a Writ of Certiorari, as follows:

> 'The crux of the issue, however, is not limited to the precise facts of this particular case. It lies in

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[7] House Rep. No. 2237, 89th Cong., 2nd Sess., on H.R. 4347 at pp. 60-1. Cf: Sen. Rep. No. 93-983, 93rd Cong., 2nd Sess. (1974), p. 116.

the principles of law enunciated by the Court below." American Guild of Authors and Composers, *et al.*, pp. 7-8.

"1. The Court's decision below, especially its rationale, (a) has an importance transcending the interests of the particular litigants . . ." Magazine Publishers Association, Inc., p. 3.

Indeed, the Petitioner itself "recognizes implications beyond the instant case", Brief p. 29.

This case is one of first impression. The Court of Claims called it "ground breaking", 487 F.2d 1345, 1346 (1973) and stated there the issue had never been determined by a court (at 1347) and that there were no prior dispositive decisions (at 1352). We have here a case where the parties have raised fundamental issues of the relationship between proprietors and users of copyrighted material; of basic questions of constitutional, statutory and common law; and of delicate questions of the judicial balancing of rights to which monopolistic claims are asserted by one side. The Court's decision as to the meaning of "fair use" will have far-ranging implications which can either advance or retard the all-important functions of America's schools. It is in this context that the National Education Association asks this Court to make its determinations in a manner conducive to, and supportive of, the finest possible educational system in this country.

In circumstances such as here indicated by the various *amici curiae,* where the issues extend far beyond the particular interests of the parties themselves, the NEA believes that the Court below was eminently correct in stating that in the "balance of risks", the balance should be in favor of the public interest represented by the Respondent.

ARGUMENT

I. CONSTITUTIONAL ISSUES

At Heart of the Case

Constitutional issues are at the very heart of this case.

Amicus respectfully suggests that "fair use" (or the right of reasonable access to copyrighted materials) has constitutional protection under the First and Ninth Amendments in the Bill of Rights. This constitutional dimension protects the right of reasonable access to the cultural, educational, scientific, historical, technical and intellectual heritage of the Nation.

This right has constitutional protection both directly and under the penumbra of

(a) the First Amendment (Freedom of Press), and

(b) the Ninth Amendment.

This case involves a conflict between

(a) the American public's *constitutional right* of reasonable access to copyrighted materials, and

(b) the copyright owner's *statutory privilege* emanating from the copyright law. In this latter connection, the Constitution gives *no* constitutional *right* to copyright owners. It merely authorizes the Congress, under severe limitations, to enact copyright legislation. At most, therefore, the copyright owner has a statutory *privilege,* not a constitutional *right.*

Consequently, in the necessary "balancing" process which this Court must undertake, the "balance" must

be in favor of the overriding and constitutionally-protected right of the American public to reasonable access to its national heritage, copyright notwithstanding. In this context, "fair use"—as a constitutionally protected right—fully sanctions the Respondent's practice in the instant case.

Need for Constitutional Decision

This Court has said: "Federal statutes are to be so construed as to avoid serious doubt of their constitutionality".[8]

Elsewhere this Court has

> "repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same".[9]

Amicus respectfully submits that, in order to avoid an unconstitutional result as applied to the facts of this case, the proper application of the First Amendment's provision protecting Freedom of Press and the Ninth Amendment's reservation of unenumerated rights to the people require interpreting the copyright clause of the Constitution, the copyright act, and the term "fair use" to authorize the long-established practice followed by Respondent in this case.

Even where it has not been necessary to reach constitutional issues to decide a case before it, this Court has specifically expressed its view on the constitutional

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[8] *International Association of Machinists* v. *Street*, 367 U.S. 740, 749 (1961). See also *Dennis* v. *United States*, 341 U.S. 494, 501 (1951); *Communist Party* v. *Catherwood*, 367 U.S. 389, 392 (1961).

[9] *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). See also *United States* v. *Rumely*, 345 U.S. 41, 45 (1953) and cases therein cited.

questions which would have been present "if reached by the court." [10] On occasion this Court has deliberately decided to reach the constitutional issue, although the case could have been decided on other grounds, because it was necessary to solve such constitutional issue in order to avoid future difficulties.[11]

This Court has also indicated that it will delve into certain areas, albeit rarely,

> "not only to make sure that substantive constitutional standards have not been thwarted, but also to provide guidance for the future to the lower courts in an area which borders so closely upon constitutionally protected rights".[12]

The instant case is peculiarly fitting, and calls out, for constitutional clarification and interpretation.

This Court may be confronted with the argument that the Constitution authorizes the Congress to enact copyright legislation. Without reference to the limited authority thus conferred, and without further reference hereinafter to the *amicus's* illustration of the difference between a constitutional right and a statutory privilege, a recent statement of this Court is applicable:

> "The existence of a permissible purpose cannot sustain an action that has an impermissible effect".[13]

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[10] *Peters* v. *Hobby*, 349 U.S. 331 (1955); *Kent* v. *Dulles*, 357 U.S. 116, 129-130 (1958). *Semble*, *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 72 (1955). See also *Volanski* v. *United States*, 246 F.2d 842, 845 (6th Cir. 1957), per Stewart, C. J.

[11] *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579, 585 (1952). *Cf: United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 387 (1948) ("While this issue need not be decided to dispose of this case, it seems inadvisable to leave the decision as a precedent.")

[12] *Scales* v. *U.S.A.*, 367 U.S. 203, 230 (1961).

[13] *Wright* v. *Emporia City Council*, 407 U.S. 451, 462 (1972).

In *Wright* v. *Emporia City Council, supra,* n. 13, this Court said it "focused upon the effect—not the purpose or motivation— . . ." [14]

As Justice Black declared in another context,

> "Freedom of the Press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." [15]

Very recently, this Court also stated that

> "A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." [16]

The constitutional issue is clearly before the court and requires adjudication in this case.

A. The Constitution Grants No Rights to Copyright Owners

Article I, §8, of the Constitution grants no rights to authors; it merely grants power to Congress to enact copyright legislation. This Court so ruled in the very first case in which it considered this problem. There, counsel for complainants insisted that the constitutional provisions did not originate a right but merely protected one already in existence. This Court specifically rejected this argument as to copyright for published material:

> "Congress then, by this act, instead of sanctioning an existing right, as contended for, created it. . . . This right, as has been shown, does not exist at com-

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[14] *Ibid.*, at 462.

[15] *Associated Press* v. *U.S.*, 326 U.S. 1, 20 (1945).

[16] *Grayned* v. *City of Rockford*, 408 U.S. 104, 114 (1972).

mon law—it originated, if at all, under the Acts of Congress." [17]

The House Report on the current Copyright Law of 1909 also made this same point crystal clear:

> "The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights. . . . The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best." [18]

A long and uninterrupted line of cases holds unequivocally that—apart from common law protection for unpublished works—copyright protection is completely and solely a matter of statute [19] and that copyright is only a privilege or a franchise.[20] Under this Court's rulings it is settled law that any copyright right is simply a creature of statute.[21] As distinguished from

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[17] *Wheaton* v. *Peters*, 8 Pet. 591, 661, 663 (1834). To the same effect, see *Mazer* v. *Stein*, 347 U.S. 201, 214 (1954); *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 127 (1932); *Caliga* v. *Inter Ocean Newspaper Co.*, 215 U.S. 182, 188 (1909).

[18] House Report No. 2222, 60th Cong., 2d Sess., p. 7.

[19] *Miller Music Corp.* v. *Daniels, Inc.*, 362 U.S. 373, 375 (1960); *Bentley v. Tibbals*, 223 F. 247, 248 (2d Cir. 1915); *Grant* v. *Kellogg Co.*, 58 F.Supp. 48, 52 (S.D. N.Y. 1944), *aff'd* 154 F.2d 59 (2d Cir. 1946); *Bobbs-Merrill Co.* v. *Strauss*, 210 U.S. 339, 346 (1908).

[20] *Local Landmarks* v. *Price*, 170 F.2d 715, 718 (5th Cir. 1948).

[21] *American Tobacco Co.* v. *Werckmeister*, 207 U.S. 284, 291 (1907); *Bobbs-Merrill Co.* v. *Strauss*, *supra* n. 19 at 346, *White-Smith Music Pub. Co.* v. *Apollo*, 147 F.226, 227 (2d Cir. 1906), *aff'd* 209 U.S. 1, 15 (1908). See also *Loew's Inc.* v. *C.B.S.*, 131 F. Supp. 165, 173 (1955), *aff'd* 239 F.2d 532 (9th Cir. 1956), *aff'd* by equally divided court, 356 U.S. 43 (1958).

literary property, copyright is wholly a matter of Congressional discretion to grant or to withhold.[22] This Court recently held that in connection with copyrights "the Constitution is permissive" not mandatory.[23]

This Court has also held that the conditions upon which copyright is granted are wholly within the constitutional power of Congress to prescribe.[24] The whole history of the copyright law shows that an author has no constitutional property right in or to copyright protection and that such "right" as an author obtains is a privilege to be granted or withheld by Congress in its discretion. As the House Report on the present copyright law said of copyright rights granted to authors: "... Congress has the power to annex to them such conditions as it deems wise and expedient." [25] The very first copyright law, enacted in 1790, 1 STAT. p. 124, c. 15, gave protection only to maps, charts and books, and that only for a 14-year period plus renewal of 14 years. It did not cover periodicals, drawings, works of art, musical composition, dramatic composition—to name but a few. And even the present far more extensive law of 1909 is not all-inclusive and places limits on authors' copyright privileges. Congress has limited the number of years during which an author may exercise copyright

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[22] *Kraft* v. *Cohen*, 117 F.2d 579, 580 (3d Cir. 1941); *Keene* v. *Wheatley*, 14 Fed Cas. 180, 185, #7644 (Cir.Ct.Pa. 1820).

[23] *Deepsouth Packing Co., Inc.* v. *The Laitram Corp.*, 406 U.S. 518, 530 (1972).

[24] *Wheaton* v. *Peters*, *supra* n. 17, at 663-4 (1834). See also *Application of Cooper*, 254 F.2d 611, 616 (C.C.P.A. 1958), *cert. denied* 358 U.S. 840 (1958); *Stuff* v. *La Budde Feed & Grain Co.*, 42 F. Supp. 493, 496 (E.D. Wis. 1941) (See NIMMER ON COPYRIGHTS (1972), p. 14.).

[25] *Op. cit.*, *supra* n. 18, p. 9.

monopoly privileges. Congress has limited the uses to which the copyright owner's privileges attach, *i.e.,* the "for profit" limitation on public performance rights; compulsory licenses; the non-inclusion of "rental rights", to cite but a few.

In addition to Congressional limitations of any so-called "property" rights in copyright, the courts have also developed a further limitation through the doctrine of "fair use"—which is the dispositive issue in this case.

And just over two years ago this Court, speaking through the Chief Justice, ruled that the constitutional copyright provision does not even provide exclusive Federal control over copyrights.[26]

Thus, it is clear that copyright is a privilege conferred by statute and not a right guaranteed by the Constitution.

B. The First Amendment Protects the American People's Right of Reasonable Access to Matter Subject to Copyright.

The First Amendment's guarantee of Freedom of the Press protects the American people's right of reasonable access to copyrighted material against the monopoly of a rigid construction of the privilege afforded under the copyright statute. In the balancing of a copyright proprietor's statutory privileges against the constitutional protection for the people's *right to know* and *right to read,* the balance must be struck in favor of the constitutional right. Although protected by the statute, the copyright privilege does not prevail against the constitutional guarantee of the First Amendment.

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[26] *Goldstein et al.* v. *California,* 412 U.S. 546, 553, 558 (1973).

1. *Freedom of Press Protects the American People Not Publishers*

The American people's rights are at stake here. More particularly, the rights of America's teachers and students, as individuals and as teachers and students, are in jeopardy unless the decision below is upheld.

The Bill of Rights exemplified a clear rationale for Freedom of Press, that a free press was the only instrumentality for protecting the American people's *right to know.*

This Court has long recognized that a free press is essential for a free people. Mr. Justice Black wrote for the Court:

> "The First Amendment . . . rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." [27]

Mr. Justice Frankfurter said in the same case that "the business of the press . . . is the promotion of truth regarding public matters by furnishing the basis for an understanding of them", and that the basic function which a Constitutionally guaranteed free press serves in our nation "is to have the flow of news not trammelled." [28]

Throughout our national history this concept of the press as an instrumentality of the American people has been pervasive in judicial readings of the First Amend-

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[27] *Associated Press* v. *U.S.*, 326 U.S. 1, 20 (1945).

[28] *Ibid.*, pp. 28, 29.

ment. Mr. Justice Sutherland wrote in connection with a claim of abridgement of freedom of press:

> "The predominant purpose of the grant of immunity here invoked was to preserve an untrammelled press as a vital source of public information." [29]

Freedom of Press is a right of the American people; the press is a trustee of that right. Freedom of Press was not designed as a special privilege for the publishing business, but rather as an extension of the personal rights of each American. It is a guaranty of the individual's rights, and was thus joined in the First Amendment of the Bill of Rights with the rights of free speech, assembly and petition.

This Court has characterized "the freedom of speech and that of press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men." [30]

This Court has also recognized that the First Amendment's guarantee of freedom of press is "not for the benefit of the press so much as for the benefit of us all." [31]

"Free press" is only a shorthand way of saying that the press must be free because of the right of all Americans to be informed. Arthur Hays Sulzburger of the

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[29] *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936).

[30] *Schneider* v. *State*, 308 U.S. 147, 161 (1939).

[31] *Time, Inc.* v. *Hill*, 385 U.S. 374 389 (1967). See also *United States* v. *Powell*, 171 F.Supp. 202, 205 (N.D. Calif. S.D. 1959).

New York Times addressed the Trustees of the New York Public Library on this issue:

> "Perhaps we ought to ask ourselves now just what freedom of the press really is . . . Freedom of press —or, to be more precise, the *benefit* of freedom of the press—belongs to everyone, to the citizen as well as the publisher. The publisher is not granted the privilege of independence simply to provide him with a more favored position in the community than is accorded to other citizens. He enjoys an explicitly defined independence because it is the only condition under which he can fully perform his role, which is to inform fully, fairly and comprehensively. The crux is *not* the publisher's freedom to print; it is rather the citizen's right to know! What I would point out is that freedom of the press is your right as citizens and not mine as a publisher." [32]

Col. Robert R. McCormick of the *Chicago Tribune* said: "The freedom of the press is the freedom of the American people." [33]

Elisha Hanson, distinguished counsel for the American Publishers Association, put it thus:

> "The right to have a free press is the right of the people, not a privilege of a particular segment of our economy engaged in the business of gathering and disseminating information in printed form. Publishers are but trustees of this right." [34]

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[32] Nov. 13, 1956. Privately printed, p. 9.

[33] McCormick, *The Case for Freedom of the Press* 23 (1933).

[34] *The Two Bulwarks of Liberty: A Free Press and an Independent Judiciary*, 41 A.B.A.J. 217, 218 (1955).

2. *The Right of Access is an Integral Part of the Rights Guaranteed by the Bill of Rights*

The right of access, as such, has been increasingly recognized by this Court as an integral part of the rights guaranteed by the Bill of Rights. Thus,

—the right of "suitable access to social, political, esthetic, moral and other ideas and experiences . . ." [35]

—the right to "receive information and ideas" [36]

—the right to receive printed matter [37]

—the right of access to certain religious publications [38]

—the right of access to a sufficient library to permit prisoners to prepare legal papers [39]

—the right of access to the Courts [40]

—the right of addressees of letters to read the letters without censorship [41]

Just as such rights of access are ancillary to, and come within the penumbra of, rights protected by the

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[35] *Red Lion Broadcasting Co.* v. *F.P.C.*, 395 U.S. 367, 390 (1969).

[36] *Kleindienst* v. *Mandel et al.*, 408 U.S. 753, 760, 762-5 (1972); *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969).

[37] *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965).

[38] *Cruz* v. *Beto*, 405 U.S. 319 (1972).

[39] *Martin* v. *City of Struthers*, 318 U.S. 141, 143 (1943). See also *Younger et al.* v. *Gilmore et al.*, 404 U.S. 15 (1971) (under equal protection clause of 14th Amendment.

[40] *California Motor Transport Co. et al.*, v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972).

[41] *Procunier* v. *Martinez*, 416 U.S. , 94 S. Ct. 1800, 1809 (April 29, 1974).

Bill of Rights [42] (or other provisions of the Constitution), so the right of reasonable access (through "fair use") to copyrighted materials pertaining to the cultural, historical, educational, scientific, technical, and religious heritage of the nation comes within the penumbra of the right of Free Press guaranteed by the First Amendment.

3. *The Rights of Free Press and Free Speech Include the RIGHT TO READ*

The First Amendment would be sterile today if its sanctions were limited to the mere act of printing or writing. The *Zenger Case* decided that over 200 years ago.[43] This Court has not so limited Freedom of Press:

> "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." [44]

This Court ruled that Freedom of Press protects not only the publisher's right to print [45] and to publish,[46]

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[42] For the *right to hear* as being within the penumbra of the Freedom of Speech provision of the First Amendment, see *Thomas* v. *Collins*, 323 U.S. 516, 534 (1945). See also *Molpus* v. *Fortune*, 432 F.2d 916 (5th Cir. 1970); *Pickings* v. *Bruce*, 430 F.2d 595, 598-9 (6th Cir. 1970); *Brooks* v. *Auburn University*, 412 F.2d 1171, 1172 (5th Cir. 1969); *ACLU* v. *Radford*, 315 F. Supp. 893 (E.D. Va. 1970); *Smith* v. *University of Tennessee*, 300 F. Supp. 777 (E.D. Tenn. 1969); *Snyder* v. *Board of Trustees*, 286 F. Supp. 927 (N.D. Ill. 1968).

[43] As far back at 1644, Milton's *Areopagitica* was a defense of "the liberty of unlicensed printing", McKEON, MERTON & GELLHORN, THE FREEDOM TO READ 43 (1957).

[44] *In the Matter of Jackson*, 96 U.S. 727, (1878), cited with approval in *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1938).

[45] *Lovell v. Griffin, supra* n. 44, at 452; *Winters* v. *New York*, 333 U.S. 507, 509 (1948). See also, *Marsh* v. *Alabama*, 326 U.S. 501 (1946); *Martin* v. *City of Struthers*, 319 U.S. 141 (1943).

[46] *Grosjean* v. *American Press Co., supra* n. 29, at 250; *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)

and the distributor's right to circulate,[47] but also the public's "right to receive information and ideas" [48] and the *public's right to read.*

Butler v. *Michigan,* 352 U.S. 380 (1957), involved a state statute which made a criminal offense of the publication, sale and distribution of any literature "tending to the corruption of the morals of youth". The statute was challenged as an unconstitutional infringement of freedom of press and due process under the First and Fourteenth Amendments. The State's Attorney General denied that the statute did violence either to the free press clause of the First Amendment or to the due process clause of the Fourteenth Amendment. And the Attorney General of Texas, *amicus curiae,* claimed that the book there in question was not within the protection of the First Amendment's freedom of press.

This Court unanimously found the statute unconstitutional:

> "The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society." (384-85)

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[47] *In the Matter of Jackson, supra* n. 44; *Winters* v. *New York,* supra n. 45.

[48] *Kleindienst* v. *Mandel et al., supra* n. 36; *Stanley* v. *Georgia,* supra n. 36, at 564; *Red Lion Broadcasting Co.* v. F.C.C., *supra* n. 35, at 390; *Griswold* v. *Connecticut,* 381 U.S. 479, 482 (1965); *Lamont* v. *Postmaster General, supra* n. 37, at 307-8 (Brennan, concurring). See also *New York Times Co.* v. *U.S.,* 403 U.S. 713 (1971).

Butler was decided in 1957. In 1965, this Court proclaimed the right—specifically—of school teachers to read, as part of their First Amendment rights, *Lamont* v. *Postmaster General, supra* n. 37 at 307. And in 1969, a plaintiff claimed "the right to read" and this Court confirmed that right, *Stanley* v. *Georgia, supra* n. 36 at 565.

As recently as April 29, 1974, this Court further broadened the constitutional protection for the RIGHT TO READ by also finding it within the constitutional guarantee for free speech under the First Amendment. In *Procunier* v. *Martinez, supra* n. 41, the Court was confronted with the censorship of mail written by prisoners. Writing for the Court, Mr. Justice Powell said:

> "Communication by letter is not accomplished by the act of writing words on paper. Rather it is effected only when the letter is read by the addressee . . . Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech . . ." (at 1809)

A leading scholar in this field recognized that

> ". . . the readers and consumers . . . have more at stake than anybody else." [49]

Thus, the Constitution protects more than freedom to print or write; without *reading* by the public "publication would be of little value."

The constitutional protections for Freedom of Press and Freedom of Speech were designed to achieve an

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[49] Chafee, *Reflections on the Law of Copyright: I*, 45 COL. L. REV. 503, 517 (1945).

end, *the right of the public to read.* In order to accomplish this end—which this Court has ruled to be included within the constitutional protection of each individual American—it is necessary to have reasonable access. Freedom of Press and Freedom of Speech must at the very least, include *freedom of access* to materials affecting the educational, cultural, historical, political, scientific and religious background of the nation. Anything less would hamstring a fundamental objective of the First Amendment, *the people's right to read.*

The applicable reach of the First Amendment is well illustrated by *Kleindienst* v. *Mandel et al., supra* n. 36, where both the majority and the minority agreed that the First Amendment guaranteed access to hear, to receive information, to learn, to know. Mr. Justice Blackmun, for the Court, said (at p. 762-3):

> "In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas'.
>
> > 'It is now well established that the Constitution protects the right to receive information and ideas. This freedom [of speech and press] . . . necessarily protects the right to receive . . .' *Martin* v. *City of Struthers,* 319 U.S. 141, 143 (1943) . . .' *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969)."

He also cited *Thomas* v. *Collins, supra* n. 42, at 534 (1945) as protecting the right of workers "to hear what he [a labor organizer] had to say". Mr. Justice Blackmun also cited *Red Lion Broadcasting Co.* v. *F.C.C., supra,* at 35, where Mr. Justice White, for a unanimous Court concerning the FCC's "fairness doctrine", stated of the First Amendment:

> ". . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other

> ideas and experiences which is crucial here. That right may not be constitutionally abridged either by Congress or by the F.C.C."

Kleindienst also cited *Lamont* v. *Postmaster General, supra* n. 37, upholding the right of an American citizen to receive communist political propaganda as a First Amendment right. Mr. Justice Blackmun stated: "This Court has recognized that this right is 'nowhere more vital' than in our schools and universities . . ."

Mr. Justice Blackmun also cited with approval the following from the District Court's opinion (at p. 764):

> "The concern of the First Amendment is . . . with the rights of the citizens of the country to have the alien enter and to hear him explain and seek to defend his views; that is of the essence of free government", 325 F.Supp., at 631.

In a comment peculiarly appropriate to the instant case, Mr. Justice Blackmun stated:

> "The Government also suggests that the First Amendment is inapplicable because appellees have free access to Mandel's ideas through his books, and speeches . . . While alternative means of access to Mandel's ideas might be a relevant factor were we called upon to balance First Amendment rights against governmental regulatory interests—a balance we find unnecessary here in the light of the discussion that follows . . .—we are loath to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access." (at p. 765)

". . . the Court's previous decisions concerning the 'right to receive information', . . . " (to use Mr. Justice Blackmun's expression, at p. 762-3) were accepted by

the dissenting opinions. Mr. Justice Douglas, wrote (at page 771):

> The First Amendment involves not only the right to speak and publish but also the right to hear, to learn, to know. *Martin* v. *Struthers,* 319 U.S. 141, 143; *Stanley* v. *Georgia,* 394 U.S. 557, 564."

And Mr. Justice Marshall's dissenting opinion, in which Mr. Justice Brennan joined, states:

> "As the majority correctly demonstrates, in a variety of contexts this Court has held that the First Amendment protects the right to receive information and ideas, the freedom to hear as well as the freedom to speak . . . the right to speak and hear—including the right to inform others and be informed about public issues—are inextricably part of that process. The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin." (p. 775)

The comments of both majority and minority in *Kleindienst,* concerning the right to hear, as part of the First Amendment, apply with equal force to the right to read, and the right of access to copyrighted reading matter.

But, it may be asked, where is there anything in the First Amendment about "the right to read"? The same sort of question was faced directly by Mr. Justice Brennan in a case where the very issue of the right to read was involved and where this Court specifically stated that the First Amendment rights of school teachers protected their *right to read.*[50] In a concurring opinion, Mr. Justice Brennan said:

> "It is true that the First Amendment contains no specific guarantee of access to publications. How-

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[50] *Lamont* v. *Postmaster General, supra* n. 37 at 307.

> ever, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgement those equally fundamental personal rights necessary to make the express guarantees fully meaningful . . . I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." (at 308)

In a similar situation concerning the right of association, Mr. Justice Powell gave this Court's answer to this sort of inquiry:

> "Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedom of speech, assembly, and petition."[51]

He also stated that ". . . the Constitution's protection is not limited to direct interference with fundamental rights." (at p. 183) Mr. Justice Powell made a point that is relevant in the current case: "We are not free to disregard the practical realities." (at p. 183)

Mr. Justice Powell extended "the practical realities" to a constitutional recognition that the *right to read* a letter written by a prisoner is guaranteed to the addressee of that letter by the free speech guarantee of the First Amendment.[52]

On the facts of the instant case, Respondent's practice is within the permissible realm of "fair use" which

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[51] *Healy et al* v. *James et al.*, 408 U.S. 169, 181 (1972)

[52] *Procunier* v. *Martinez, supra* n. 41, at 1809.

derives from the right of access that is constitutionally-protected by the First Amendment's Free Press and Free Speech clauses. For the purpose of this case, it is not necessary to decide the outer reach of such right.

4. *The First Amendment Protects the Student's Right to Learn*

The First Amendment protects, as has already been indicated,

—the right of "suitable access to social, political, esthetic, moral and other ideas and experiences"

—the right to "receive information and ideas"

—the right to receive printed matter

—the right to hear

—the "right to read"

So far as the student is concerned, all of these constitutionally protected rights add up to the RIGHT TO LEARN, a right that derives directly from the First Amendment.[53]

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[53] A similar protection emanates from the Fourteenth Amendment. *Meyer* v. *Nebraska*, 262 U.S. 390 (1923) (". . . denotes . . . . the right of individual to acquire useful knowledge . . ."). See also *Serrano v. Priest*, 5 Cal. 3d 584, 589, 487 Pac. 2d 1241 (1971). (At 618: ". . . in a democratic society free public schools shall make available to all children equally the abundant gifts of learning."). See also *Hobson* v. *Hanson*, 269 F.Supp. 401, 480, 488, 492, 512-3 (196[illegible], *app. dism'd.* 393 U.S. 801 (1969) where the Court struck down a school board's "track system" of assigning pupils as being contrary to their right to learn. The decision was based on the equal protection clause.

This Court said that the "aim" of the First Amendment "was to unlock all ideas . . ." [54] Mr. Justice Douglas said that

> ". . . the First Amendment involves . . . the right . . . to learn, to know . . ." [55]

This constitutionally-protected *right to learn* requires reasonable access, through "fair use", to copyrighted materials which are basic to the learning process.

5. *The First Amendment Protects the Freedom of Teachers and Students to Reasonable Access to Copyrighted Materials*

This Court has said that

> "The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools." [56]

This right involves not only the Respondent in this case but also the teaching process in the United States, with its many million teachers and students. And, of course, children are within the protection of the Bill of Rights. "Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." [57] The Sixth Amendment protects a 12-year old,[58] and First Amendment rights apply to teen-agers.[59]

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[54] *Times Film Corp.* v. *Chicago,* 365 U.S. 43, 81 (1969).

[55] *Kleindienst* v. *Mandel et al., supra n.* 36, at 771 (dissenting). For the "right to know" under the Ninth Amendment, see *infra.*

[56] *Shelton* v. *Tucker,* 364 U.S. 479, 487 (1960).

[57] *In re Gault,* 387 U.S. 1, 13 (1967).

[58] *In re Winship,* 397 U.S. 358 (1970).

[59] *Tinker* v. *Des Moines School District,* 393 U.S. 503 (1969); *Board of Education* v. *Barnette,* 319 U.S. 624 (1943).

Chief Justice Warren said, for this Court, that

> "Teachers and students must always remain free to inquire, to study and to evaluate . . ." [60]

The First Amendment is basic to effective teaching. As this Court has stated:

> 'The First Amendment was designed to enlarge, not to limit, freedom in literature and in the arts as well as in politics, economics, law, and other fields . . . Its aim was to unlock all ideas for argument, debate, and dissemination." [61]

Both the teaching and the learning process require such "unlocking" of ideas through reasonable access to knowledge, which means reasonable access via "fair use" to materials subject to copyright protection. Cardozo put it well:

> "There is no freedom without choice and there is no choice without knowledge . . . Implicit, therefore, in the very notion of liberty is the liberty of the mind to absorb and beget . . . At the root of all liberty is the liberty to know." [62]

As illustrated by the NEA's statement of interest, *supra,* we have here a situation in which this Court can not shut its eyes to "the plainest facts of our national life".[63]

We have here far more than "harmless, empty shadows".[64] A "pragmatic assessment [65] of the instant

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[60] *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957).

[61] *Times Film Corp.* v. *Chicago*, 365 U.S. 43, 81 (1961).

[62] CARDOZO, PARAZOXES (1928), 104.

[63] *NLRB* v. *Jones & Laughlin Steel Corp., supra* n. 9, at 41 (1937).

[64] *Poe* v. *Ullman*, 367 U.S. 497, 508 (1961).

[65] *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 442 (1957).

situation justifies the fear that by ignoring First Amendment rights the Petitioner's position, if applied to the educational system, could destroy the capacity of America's teachers to teach effectively and seriously inhibit the effectiveness of the pupils' learning process.

C. The Ninth Amendment Protects the Right of Americans to Knowledge and to Read

The Ninth Amendment to the Constitution provides as follows:

> "The Enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

This is the reserved right of the American people to all rights not specifically granted by the Constitution, the right to all unenumerated rights.

The Ninth Amendment was described in Mr. Justice Goldberg's concurring opinion (for himself, the Chief Justice and Mr. Justice Brennan) in *Griswold* v. *Connecticut:* [66]

> "The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments . . ." (p. 488)

He continued:

> "The Ninth Amendment simply shows that the intent of the Constitution's authors that other fundamental rights should not be denied such protection or disparaged in any other way simply because

[66] 381 U.S. 479 (1965).

> they are not specifically listed in the first eight constitutional amendments." (p. 492)

Mr. Justice Goldberg saw the following as the "fundamental rights" protected by the Ninth Amendment but not listed in the previous eight:

> "In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." *Snyder* v. *Massachusetts,* 291 U.S. 97, 105. The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . ." *Powell* v. *Alabama,* 287 U.S. 45, 67. "Liberty" also gains content from the emanations of . . . specific [constitutional] guarantees" and "from experience with the requirements of a free society." *Poe* v. *Ullman,* 367 U.S. 497, 517 (dissenting opinion of Mr. Justice Douglas)" (p. 493-4).

There is strong historical justification for the belief that the intent of the framers of the Bill of Rights was that the Ninth Amendment should apply "where the asserted right appears to the court as fundamental to a free sociey but is, nevertheless, not specified in the Bill of Rights".[67]

In a democracy nothing is more fundamental than the right of the people to have reasonable access to the cultural heritage of the nation. This is an absolute

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[67] Redlich, *Are There 'Certain Rights Retained by the People'?* 37 N.Y.U.L. Rev. 787, 808 (1962).

necessity for teachers, if a democracy is to survive and protect itself as a free society.

> "The Ninth Amendment is a reservoir of personal rights necessary to preserve the dignity of existence of man in a free society." "The Ninth Amendment is the place to which we must turn for protection of individual liberty from infringements not enumerated and perhaps not contemplated, by the founding fathers." [68]

"The ninth amendment was intended to assert that the constitutional formulations were not to be narrowly interpreted".[69] A leading legal commentator indicates that, whatever else the Amendment may cover, it provides for "the right to have access to information . . .":

> "Related to this right to information is the right to know as encompassed in academia and cultural freedom. A college professor or school teacher has the right to pursue knowledge . . ." [70]

Another distinguished commentator said (even before *Griswold*):

> "One of the newest of the unenumerated rights is that to knowledge." [71]

If the right of young people to wear long hair in school comes within the penumbra of the First Amend-

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[68] *State* v. *Abelloni*, 50 Hawaii 384, 390, 393 (1968) (Levenson, J. concurring).

[69] Kutner, *The Neglected Ninth Amendment: The 'Other Rights' Retained by the People*, 51 MARQ. L. REV. 121, 125 (1968).

[70] *Ibid.*, at 139.

[71] O. John Rogge, *Unenumerated Rights*, 47 CAL. L. REV. 787, 811 (1959).

ment and the reach of the Ninth Amendment,[72] then how much more valid is the application of the Ninth Amendment to something as fundamental to a free democratic society as the right of those same students (and their teachers) to reasonable access, through "fair use", to that society's cultural heritage?

But what about the impact of the copyright provision of the Constitution (Article 1, Section 8) on the Ninth Amendment? In *Ashwander* v. *TVA*,[73] this Court stated:

> "And the Ninth Amendment . . . does not withdraw the rights which are expressly granted to the Federal Government. The question is as to the scope of the grant and whether there are inherent limitations . . ."

The Ninth Amendment's reach starts, at least, from the limited "scope of the grant" for copyright legislation and from the "inherent limitations" so clearly illustrated by the judicial development of the doctrine of "fair use" notwithstanding the seemingly complete monopolies granted by the copyright laws.

Under the Ninth Amendment, "rights may arise or appear by reason of limitations placed upon or by limits of granted powers".[74]

> "A person has the right not to have the government act where it lacks power. In addition, he

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[72] *Breen* v. *Kahl*, 419 F.2d 1034, 1036 (7th Cir. 1969), *cert. den.* 398 U.S. 937 (1970). *Contra, King* v. *Saddleback Jr. Col. Dist.*, 445 F.2d 932 (9th Cir. 1971), *cert. den.* (with 2 dissents) 404 U.S. 979 (1971).

[73] 297 U.S. 288, 330-1 (1936).

[74] Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L. J. 309, 311 (1936).

> has other rights, which deny government power to act where otherwise it might. For example, the government has the power to regulate bankruptcy proceedings [U.S. Constitution, Art. I, Section 8], but it lacks power to regulate them in such a way that a property owner is deprived of property without due process of law [*Louisville Bank* v. *Reedford,* 295 U.S. 555 (1935)]. The government has power to preserve its own existence [*Dennis* v. *U.S.,* 341 U.S. 494, 501 (1951)], but that power is tempered by the rights guaranteed by the First and Fifth amendments [Aptheker v. Secretary of State, 378 U.S. 500 (1964)]. Similarly, where a person has an inherent right, recognized by the ninth amendment, it protects him against some exercise of power which might otherwise be proper. . . . It is in areas where government has power to act that it is important to the individual to have positive rights." [75]

The balancing of various constitutional provisions seemingly applicable to the same set of facts is not a unique experience for this Court. Recently Mr. Justice Rehnquist for the Court, cited with approval an earlier decision of this Court as follows:

> "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 332 (1964).[76]

And Mr. Justice Stewart concurring in the same case, stated:

> " . . . And it most assuredly is not to say that the Twenty-first Amendment necessarily overrides in

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[75] Comment, G. L. Garner, *The Ninth Amendment,* 30 ALBANY L. REV. 89, 99 (1966).

[76] *California* v. *La Rue,* 409 U.S. 109, 115 (1972).

> its allotted area any other relevant provisions of the Constitution." [77]

Amicus respectfully submits that, the copyright clause notwithstanding, the Ninth Amendment guarantees and protects the right of American citizens *to read* the cultural heritage of their nation, and authorizes for teachers *reasonable* access to such heritage for their teaching duties, even when the material so used is in copyrighted form. These rights come within what Mr. Justice Douglas, speaking for the Court in *Griswold,* and specifically mentioning the Ninth Amendment, called

> "penumbras, formed by emanations from those [Bill of Rights] guaranties that help give them life and substance." [78]

The Ninth Amendment fully authorizes the Respondent's practices in this case as constitutionally-protected "fair use".

D. The Constitution Is A Living Document.

The Constitution is a living and sensitive document which adjusts to the major needs of the American people. The Bill of Rights protects freedom of reasonable access to the nation's cultural heritage, under the copyright law, and thus sanctions Respondent's practice in this case. That the articulation of the constitutional right of reasonable access might appear novel is no defense against its validity. Chief Justice Burger stated that it makes no constitutional difference "that it has taken this Court nearly two centuries

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[77] *Ibid.*, footnote page 120.

[78] *Supra* n. 66, at 484.

to 'discover' a constitutional mandate . . ." [79] In *Johnson* v. *Louisiana* [80] this Court reinterpreted a 200-year-old and admittedly settled doctrine of American legal history. What was involved there, as well as here, is what Mr. Justice Powell called "a change in focus in the Court's approach . . ." [81] and the requirement for "a fresh look at the question . . ." [82] Only in 1972 did this Court find constitutional infirmity in capital punishment under the Eighth Amendment although admittedly it had "been employed throughout our history." [83] It was not until 1973 that this Court held that anti-abortion statutes were unconstitutional [84] and that a six-member jury in civil proceedings complied with the Seventh Amendment.[85] And not until July 1974 did this Court rule that the President of the United States had no absolute right of executive privilege.[86]

The very fact that constitutional protection for "fair use" has not been customarily articulated is in itself an aid to this Court in the present instance. As this Court stated more than 90 years ago:

> "The question is now a new one in this court, and we are not fettered by an inveterate course of de-

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[79] *Coleman* v. *Alabama*, 399 U.S. 1, 22 (1970).

[80] 406 U.S. 404 (1972).

[81] *Ibid.*, p. 372, note 9. (concurring)

[82] *Ibid.*, p. 376. See also *Erie* v. *Tompkins*, 304 U.S. 64 (1938); *Brown* v. *Board of Education*, *supra* n. 3; *Cooper* v. *Aaron*, 359 U.S. 1 (1958).

[83] *Furman* v. *Georgia*, 408 U.S. 238 (1972).

[84] *Roe et al.* v. *Wade*, 410 U.S. 113 (1973).

[85] *Colgrove* v. *Bettin*, 413 U.S. 149 (1973).

[86] *U.S.* v. *Nixon*, 418 U.S. , 42 L.W. 5237 (July 24, 1974).

> cision upon it. We are at liberty . . . to decide it upon reason and not by precedent." [87]

As the ancient law giver Maimonides put it, the gates of interpretation are never closed.[88]

This Court has said:

> "The Constitution of the United States . . . was made for an undefined and expanding future.
>
> "It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government." [89]

With reference to the meaning of words in constitutional context, Mr. Justice Holmes said:

> "[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begettors . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." [90]

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[87] *Conner* v. *Long*, 104 U.S. 228, 243 (1881).

[88] THE GUIDE OF THE PERPLEXED (ed. S. Pines, Univ. of Chicago, 1963), 327-8.

[89] *Hurtado* v. *California*, 110 U.S. 516, 531, 530 (1884).

[90] *Missouri* v. *Holland*, 252 U.S. 416, 433 (1922).

This Court cited with approval another relevant comment by Mr. Justice Holmes:

> "But as Mr. Justice Holmes once said: 'The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.' *Gompers* v. *United States,* 233 U.S. 604, 610." [91]

The sensitivity of the Constitution to "the new circumstances and situations" constantly facing the American people, its "adaptability",[92] is especially true of the great liberties protected by the First Amendment.

As Mr. Justice Frankfurter said: "Some words are confined to their history; some are starting points for history. Words are intellectual and moral currency . . . Like currency words sometimes appreciate or depreciate in value." [93] Cardozo said: "The great generalities of the Constitution have a content and significance that vary from age to age." [94]

Words can "import a policy that goes beyond them." [95] In constitutional interpretation it is neces-

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[91] *Konigsberg* v. *State Bar of California,* 366 U.S. 36, 49-50, note 10 (1961).

[92] *Appalachian Coals Inc.* v. *United States,* 288 U.S. 344, 360 (1933), per Hughes, Ch. J.

[93] Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Col. L. Rev. 527, 537-38 (1947).

[94] Nature of the Judicial Process (1921), 17.

[95] Holmes J., *Olmstead* v. *United States,* 277 U.S. 438, 469 (dissenting); majority decision overruled, *Katz* v. *U.S.,* 389 U.S. 347, 352 (1967).

sary to go "far beyond the meaning of the phrase in isolation" to its "guiding history".[96]

The purpose of Constitutional provisions is the controlling feature in their application according to this Court. Mr. Justice McKenna said for this Court:

> "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. *Time works changes, brings into existence new conditions and purposes. Therefore, a principle, to be vital, must be capable of wider application than the mischief which gave it birth.* This is peculiarly true of constitutions . . . In the application of a constitution, therefore our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power . . . *Rights declared in words might be lost in reality.* And this has been recognized. The meaning and vitality of the Constitution has been developed against narrow and restrictive construction."[97]

This Court has long been responsive to the special need for guarding the Bill of Rights and especially First Amendment rights "with a jealous eye".[98] A

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[96] *Chapman* v. *United States*, 365 U.S. 610, 619 (1961), per Frankfurter, J., concurring. *Cf:* "Reasoning which in one age would make no impression whatsoever, in the next age is received with enthusiastic applause", I Lecky, HISTORY OF THE RISE AND INFLUENCE OF THE SPIRIT OF RATIONALISM IN EUROPE, vii (1865).

[97] *Weems* v. *United States*, 217 U.S. 349, 373 (1910) (emphasis added.) *Cf:* Mr. Justice Harlan, dissenting, *Poe* v. *Ullman*, *supra* n. 64, at 544.

[98] *AFL* v. *Swing*, 312 U.S. 312, 325 (1941).

liberal interpretation of such rights has been called by this Court "the only conclusion supported by history":

> "For the First Amendment does not speak equivocally . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."
>
> ". . . the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society."[99]

First Amendment rights have been persistently protected from erosion by indirection as well as by direct act.[100] "Sophisticated as well as simple minded" evasions of Constitutional rights have been condemned.[101] "The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name."[102] The substance, "the thing", in Freedom of Press, is *freedom of reasonable access.*

The extraordinary genius of the Bill of Rights is its adaptability to the problems of each successive generation of Americans. The present generation's special

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[99] *Bridges* v. *California*, 314 U.S. 252, 263, 265 (1941). See also *Olmstead* v. *United States, supra* n. 95, at 471, 476.

[100] *Guinn* v. *United States*, 238 U.S. 347, 361 (1915); *Grosjean* v. *Amer. Press Co., supra* n. 29, at 250 (1936); *Speiser* v. *Randall*, 357 U.S. 513, 518 (1958). See also *United States ex rel Milwaukee Publication Co.* v. *Burleson*, 255 U.S. 407, 430-31 (1931) (Brandeis, J., dissenting); *United States* v. *Rumely, supra* n. 9 at 58 (Douglas J., concurring).

[101] See Mr. Justice Frankfurter's comment, *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939). *Cf: Louisiana ex rel Gremelion* v. *NAACP*, 366 U.S. 293 (1961).

[102] *Cummings* v. *Missouri*, 4 Wall. 277, 325 (1866).

and urgent problem is the protection and assurance of the American people's right of reasonable access to its cultural heritage through the doctrine of "fair use" of copyrighted materials. The history of the struggle for Freedom of Press and Freedom of Speech bars any notion that the Bill of Rights provides freedom to print and disseminate information but denies freedom to acquire it through reasonable access and "fair use". In the context of mid-20th century America and the present world situation, *Freedom of Press must embody reasonable access, and "fair use" of, the nation's heritage.*

The very nature of the Bill of Rights calls for its interpretation and re-interpretation to meet new and undecided issues. Such is this case.

E. In "Balancing" Interests, Courts Must Give Priority to the Public Interest (For Reasonable Access) Over the Statutory Privilege of a Copyright Proprietor

"Cases such as this one inevitably call for a delicate balancing of important but conflicting interests", said Mr. Justice White in a different context. That statement is completely applicable here.[103]

> "When Congress' exercise of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated." [104]

As Mr. Justice Marshall wrote:

> "As *Robel* and many other cases show, all governmental power—even the war power, the power to

[103] *State of Wisconsin* v. *Yoder et al.*, 406 U.S. 205, 237 (1972) (concurring).

[104] *U. S.* v. *Robel*, 389 U.S. 258, 264 (1967).

> maintain national security, or the power to conduct foreign affairs—is limited by the Bill of Rights. When individual freedoms of Americans are at stake, we do not blindly defer to broad claims of the Legislative or Executive, but rather we consider those claims in the light of the individual freedom." [105]

And as has already been noted, Mr. Justice Rehnquist adopted the following language where two constitutional provisions seem relevant,

> ". . . each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case . . ." [106]

"Balancing" has a unique context in copyright matters. As Story said in one of the very early cases:

> "Patents and copyrights approach, nearer than any other class of cases belonging to forensic discussion, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, almost evanescent." [107]

And Chafee stated that

> "Copyright admits of philosophic thinking more than most other parts of the law." [108]

Holmes warned courts of this sort of special problem:

> "I think that judges themselves have failed adequately to recognize their duty of weighing con-

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[105] *Kleindienst* v. *Mandel et al.*, *supra* n. 36, at 782-3 (dissenting).

[106] *California* v. *LaRue*, *supra* n. 76, at 115.

[107] *Folsom et al.* v. *Marsh et al.*, 9 Fed. Cas. 342, No. 4901, at 344 (1811).

[108] Chafee, *supra* n. 49, at 503.

> siderations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious . . . " [109]

1. *Primacy of the Public Interest in Copyright Law*

The Congress, this Court, and the Register of Copyrights have all affirmed the primacy of the public interest over the copyright proprietor's interest:

The House Report on the present law stated that copyright was enacted

> "not primarily for the benefits of the author, but primarily for the benefit of the public." [110]

This Court has said:

> " . . . the copyright law . . . makes a reward to the owner of secondary consideration." [111]

The Register of Copyrights stated to Congress in his Report: [112]

> "Within limits the author's interests coincide with those of the public. Where they conflict the public interest must prevail. . . . And the interests of the authors must yield to the public welfare where they conflict." (p. 6)

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[109] Holmes, *The Path of the Law*, 10 HARV. L. REV. 458, 467 (1897).

[110] House Report No. 2222, 60th Cong., 2d Sess., p. 9.

[111] *Mazer* v. *Stein*, *supra* n. 17, at 219 (1954). *Accord.: U.S.* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948); *U.S.* v. *Loew's Inc.*, 371 U.S. 38, 46 (1962).

[112] COPYRIGHT LAW REVISION, Report of the Register of Copyrights, House Com. Print, 87th Cong., 1st Sess. (July 1961).

> "The needs of all groups must be taken into account. But these needs must also be weighed in the light of the paramount public interest." (p. xi)

In "balancing" between the copyright owner's mere statutory privilege and the user's constitutional rights, the decision must fall on the user's side of the line, in terms of the concept adopted by this Court.[113]

With particular reference to the judicial doctrine of "fair use"—the issue at stake in this case—the courts gave as a justification for their doctrine the constitutional requirement to subordinate the interest of the copyright proprietor to the public interest.[114]

Heed to the fragility of constitutional rights was urged by this Court. The "spike mike" decision, said Mr. Justice Stewart,

> "is based upon the reality of an actual intrusion into a constitutionally protected area. What the Court said long ago bears repeating now: 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.' *Boyd* v. *United States,* 116 U.S. 616, 635." [115]

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[113] *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968).

[114] *Berlin* v. *E. C. Publications Inc.*, 329 F.2d 541, 543-4 (2d Cir. 1961), *cert. den.* 379 U.S. 822; *Rosemont Enterprises Inc.* v. *Random House, Inc.*, 366 F.2d 303, 309 (2d Cir. 1966), *cert. den.* 385 U.S. 1009; *Greenbie* v. *Noble*, 151 F. Supp. 45, 67 (D.C.N.Y. 1957).

[115] *Silverman* v. *U.S.*, 365 U.S. 505, 512 (1961).

Inconspicuous rejection or unrecognized suppression of reasonable access (or "fair use") to materials vital to the teaching and learning of America's cultural heritage can, and often is, achieved through copyright.

Petitioner's position could well deprive Respondent —and, by extension, millions of teachers and students in America's schools—of rights of Freedom of Press guaranteed by the First Amendment.

2. *Copyright Monopoly Must Be Strictly Construed*

This Court has indicated that copyright ownership is a monopoly. For the Court, Chief Justice Hughes said:

> "The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property." [116]

"Copyrights", the Attorney General of the United States stated, "are forms of monopolies . . . " [117] Even at its best, wrote the Assistant Librarian of this Court, "copyright necessarily involves the right to restrict as well as to monopolize the diffusion of knowledge." [118] In *Fortnightly,* this Court showed its antipathy to broadening the scope of the copyright owner's monopoly:

> "The Copyright Act does not give a copyright holder control over all uses of his copyrighted

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[116] *Fox Film Corp.* v. *Doyal, supra* n. 17, at 127.

[117] House Rep. No. 1742, on H.J. Res. 676, 87th Cong., 2d Sess. (May 2, 1962), p. 6.

[118] Hudon, *The Copyright Period: Weighing Personal Against Public Interest,* 49 ABAJ 759 (1963).

> work. Instead, § 1 of the Act enumerates several 'rights' that are made 'exclusive' to the holder of the copyright. If a person, without authorization from the copyright holder, puts a copyrighted work to a use within the scope of one of these 'exclusive rights', he infringes the copyright. If he puts the work to a use not enumerated in § 1, he does not infringe." [119]

In a patent case arising under the copyright-patent provision of the Constitution, Mr. Justice White said for this Court:

> "Moreover, we must consider petitioner's claim in the light of this Nation's historical antipathy to monopoly." [120]

Mr. Justice Douglas recently adverted to the relationship between monopoly and the constitutional status of copyright:

> "While this Court has not had many occasions to consider the constitutional parameters of copyright power, we have indicated that the introductory clause, "To promote the Progress of Science and useful arts", acts as a limitation on Congress' power to grant monopolies through patents. In

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[119] *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390, 20 L.Ed. 2d 1176, 1180 (1968). Footnote 8 of the Court's opinion reads in part, as follows:

"8. 'The fundamental [is] that "use" is not the same thing as "infringement," that use short of infringement is to be encouraged . . .,' Kaplan, An Unhurried View of Copyright 57 (1967)." This quotation was again cited in *Teleprompter Corp.* v. *C.B.S.*, 415 U.S. 394, 94 S. Ct. 1129, 1133 (March 4, 1974).

[120] *Deepsouth Packing Co., Inc.* v. *The Laitram Corp., supra* n. 23, at 530. A footnote to this statement said, "See the discussion in *Graham* v. *John Deere*, 381 U.S. 1, 7ff (1966)".

Graham v. *John Deere Co.*, 383 U.S. 1, 5-6, we said:

> 'The clause is both a grant of power and a limitation . . . The Congress in the exercise of the patent power may not overreach the restraints posed by the stated constitutional purpose . . . "

He continued:

> "The framers of the Bill of Rights added the guarantees of freedom of speech and of the press because they did not feel them to be sufficiently protected by the original Constitution. This liberty is necessary if we are to have free, open, and lively debate of political and social ideas . . . *We should not construe the copyright laws to conflict so patently with the values that the First Amendment was designed to protect.*" [121]

Petitioner argues (Brief, p. 42) that whatever may have been legal prior to photocopying, the whole context has changed (to the presumed detriment of the user's legal rights) with the advent of the photocopying machine. This is erroneous in constitutional terms. That the photocopier was not contemplated in 1909, when the present copyright law was enacted, gives the copyright owner no greater monopoly than he would have had with earlier systems of reproducing copies. See, for example, *U. S. et al.* v. *Midwest Video Corp.*, 406 U.S. 649, 650 (1972), where the Court held that the Federal Communications Commission had jurisdiction over CATV although CATV "was developed long after enactment of the Communications Act of 1934." See

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[121] *Lee et al.* v. *Runge*, 404 U.S. 887, 888-9, 892-3 (1971) (dissenting on denial of petition for writ of certiorari) (emphasis added).

also concurring opinion of Chief Justice Burger (at p. 649).

It is also relevant to note that the Copyright Office submitted a brief *amicus* to this Court in *Mazer* v. *Stein, supra* n. 17, which made the important point that the method of reproduction does not affect the copyrightability of a work. The Copyright Office's *Brief Amicus* to this Court in *Mazer* stated:

> "Literary works which in an earlier era would perhaps have been reproduced by hand on illuminated parchment or in other single copies have not become less copyrightable by virtue of their present reproduction in thousands of copies by manufacturing techniques involving the use of movable types, plates, etc. Similarly, painting masterpieces once reproduced on canvas or as murals in single copies are now frequently reproduced in color plates for distribution in thousands of individual copies or in periodical or book form. *Neither the mechanical and manufacturing processes used in this reproduction, the number of copies . . . would appear to affect the copyrightability or essential nature of the work itself.*" (pp. 30-1, n. 13) (*italics supplied*)

It would seem an *a fortiori* conclusion that the same proposition constitutionally applies to "fair use" and that reasonable copying for non-profit educational purposes does not become an infringement because it is done by photoduplicators rather than by hand.

Thus, in terms of "balancing" rights, the monopoly-granting power of the copyright provision of the Constitution must be construed in a manner consonant with two fundamental considerations:

(1) that Congress's monopoly-granting power in copyright is very limited and restricted; and

(2) that the copyright-granting power of Congress cannot override rights protected by the First and Ninth Amendments of the Bill of Rights.

In "balancing" the interests involved, it is sufficient for this Court to rule that in the current case the Respondent acted within its rights. It is not necessary, in this case, to reach any other questions on the relationship of the First Amendment and the copyright clause.[122] This is all the more true since we have here merely a question of determining the meaning and scope of the judicial doctrine of "fair use". In this case, Respondent's use was clearly a "fair use". The further reach of the constitutional protection, if any, must await the customary case-by-case determination based on specific facts of the particular case.

F. The Burden of Proof is on the Copyright Proprietor to Show That an Alleged Infringement is Not Protected by the First or Ninth Amendments

Significant procedural effects attach to the concomitant legal conclusions that copyright is merely a statutory privilege whereas "fair use" has constitutional protection. Without its constitutional dimension, "fair use" has been regarded as merely an affirmative defense, which puts the burden of proof on the user, as an alleged infringer, to prove that the alleged infringement was a "fair use". B. RINGER AND P. GITLIN, COPYRIGHTS (Rev. 1965 ed.), pp. 68-9; NIMMER, *supra,* Section 145. However, once "fair use" is properly vested with its appropriate constitutional basis, the burden of proof shifts to the copyright proprietor

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[122] See *Ashwander* v. *TVA, supra* n. 73, at 347 (Brandeis, J., concurring).

to prove that an alleged infringement is not protected by the First and Ninth Amendments.

This location of the burden of proof is an appropriate adjustment between a statutory privilege (i.e., copyright) and a constitutionally-guaranteed right ("fair use").

II. CUSTOMARY USE IS "FAIR USE" UNDER THE COPYRIGHT LAW

A use that has been sanctioned by custom *is* "fair use", without regard to other criteria which may be applicable to uses not sanctioned by custom. Once a "fair use" has been moulded by custom, it operates without regard to the normal criteria used for determining whether a use is a "fair use".

A. Custom and the Common Law

"Fair use" is a common law doctrine, fashioned by the courts themselves. The courts have rejected the purportedly "exclusive" rights of the copyright proprietor, by developing the common law doctrine that some uses, "fair uses", are exempted from the copyright proprietor's monopoly.

The history of Anglo-Saxon law teaches that common law springs, to a large degree, out of custom. Holmes, in the opening paragraph of THE COMMON LAW (1881), said: "The life of the law is not logic, but experience." (p. 5).

Elsewhere in the same classic, Holmes speaks of a specific field of law:

> " . . . may only mean that the custom of the realm and the common law are the same thing . . . " (p. 150)

Story wrote:

> "The common law is the *lex non scripta,* that is, the unwritten law, . . . composed of customs, and usages, and maxims." [123]

Blackstone wrote:

> "The unwritten or Common Law is properly distinguishable into three kinds: (1) General customs . . . (2) Particular customs . . . (3) Certain particular laws . . . " [124]

Holland put it thus:

> "Custom exists in law in every country . . . It is known in England as 'the common law' . . . " [125]

Our courts have accepted this same doctrine. This Court said in 1870:

> "Customs have sprung from the necessities and convenience of business and prevailed in duration and extent until they acquired the force of law. This mass of our jurisprudence has thus grown, and will continue to grow, by successive accretions." [126]

And similar expressions have been found in more recent Federal decisions:

> —" . . . a lawful custom is itself part of the common law." [127]
>
> —"A lawful custom is part of the common law . . . " [128]

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[123] STORY, MISCELLANEOUS WRITINGS, (1852, reprint 1969) 442.

[124] COMMENTARIES, pp. 67-8.

[125] THE ELEMENTS OF JURISPRUDENCE (1910), 59.

[126] *Merchants' Bank* v. *State Bank*, 10 Wall. 604, 651 (1870).

[127] *Nicoll* v. *Pittsvein Coal Co.*, 269 F. 968, 971 (2d Cir. 1920).

[128] *U.S. Shipping Board E. F. Corp.* v. *Levensaler*, 290 F. 297, 300 (C.A.D.C. 1923), *cert. den.* 266 U.S. 630 (1924).

B. Custom and "Fair Use"

In one of the earliest copyright cases before it, this Court clearly indicated that "custom or usage" is a valid basis for determining the common law of copyright.[129]

A leading case speaks of:

> " . . . what is commonly referred to as a 'fair use' —one that is reasonable and customary." [130]

Another Federal Court defined "fair use" as follows:

> "Though technically an infringement of copyright, it is allowed by law on the ground that the appropriation is reasonable and customary." [131]

And a Federal Court of Appeals has stated that

> " . . . it is both reasonable and customary for biographers to refer to and utilize earlier works . . . " [132]

The same position had earlier been adopted by the very early English cases. In 1761, in a case where the question was the copying of one-tenth of a work, the court said:

> "Consider it upon the custom and usage." [133]

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[129] *Wheaton* v. *Peters*, *supra* n. 17 at 659.

[130] *Shapiro, Bernstein & Co. Inc.* v. *P. F. Collier and Son, Co.*, 26 U.S.P.Q. 40, 42 (S.D.N.Y. 1939).

[131] *Holdredge* v. *Knight Pub. Corp.*, 214 F. Supp. 921, 924 (D.C. Calif. 1963).

[132] *Rosemont Enterprises Inc.* v. *Random House, Inc.*, *supra* n. 114, at 308.

[133] *Dodsley* v. *Kinnersley*, 27 Eng. Rep. 270, 271 (1761).

In another early English case involving very substantial copying, an injunction was denied because

> " . . . it is very important to observe that, for many years, such a course as I have stated has been pretty generally adopted . . . " [134]

Halsbury states:

> "As regards the matter to which it relates, a custom takes the place of the general common law." [135]

The legal commentators on copyright have also equated custom and "fair use", at least since Drone in 1879: [136]

> "simply a use which is legally permissive, either because of the scope of a copyright, the nature of a work, *or by reason of the application of known commercial, social or professional usages, having the effect of custom,* insofar as these do not expressly run contrary to the plain language of copyright legislation." [137]

De Wolf described "fair use" as

> "a use technically forbidden by the law, but allowed as reasonable and customary . . . " [138]

Ball wrote:

> "Fair use is technically an infringement of copyright, but is allowed by law on the ground that the appropriation is reasonable and customary." [139]

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[134] *Saunders* v. *Smith*, 40 Eng. Rep. 1100, 1107 (1838).

[135] Laws of England (3rd ed. 1955).

[136] Drone, A Treatise on the Law of Property in Intellectual Productions (1879), 389.

[137] Weil, American Copyright Law (1917) 429 (underlining supplied).

[138] De Wolf, an Outline of Copyright Law (1925) 143.

[139] Ball, The Law of Copyright and Literary Property (1944) 260. Cited with approval in *Loew's Inc.* v. *C.B.S.*, *supra* n. 21, at 175.

Nicholson stated:

> "'Fair use' of copyrighted material has been defined by the courts as that extra-legal use that is usual, reasonable and customary." [140]

Similar comments appear in the law reviews. [141]

A significant comment was made by a distinguished and long-time leader of the copyright bar, Joseph A. McDonald:

> "Non-infringing uses are either 'fair use' as recognized in the decided cases or uses which are sanctioned by custom in the trade or in the business to which they relate. It might be argued that uses which are sanctioned by custom are impliedly authorized. This is true. However, such an authorization springs not from the owner of the material or his representative but from the overall framework of creation, licensing or use in the field. Under such circumstances the authorization, express or implied, of the individual owner is not needed by the user." [142]

This latter point is clear, and attested by many cases, that consent by the copyright owner is not necessary where custom has its effect:

> ". . . custom derives its efficacy from its adoption into law, and when once established is binding,

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[140] NICHOLSON, A MANUAL OF COPYRIGHT PRACTICE FOR WRITERS, PUBLISHERS AND AGENTS (2d ed. 1956) 91.

[141] Comments and Notes, *Copyright Fair Use—Case Law and Legislation*, 1969 DUKE L. J. 73, 88; Student Comment, *The Effect of the Fair Use Doctrine in Textbook Publishing and Copying*, Part II, 2 AKRON L. REV. 112 (1968); Case Note, 15 SO. CALIF. L. REV. 249 (1942).

[142] Jos. A. McDonald, *Non-Infringing Uses*, 9 BULL. OF COPYRIGHT SOCIETY OF U.S.A. 466 (Aug. 1962).

> irrespective of any manifestation of assent by parties concerned . . ." [143]

"Fair use" does not depend upon the consent of the copyright owner, whether it derives from various criteria or from custom independently of other criteria.

The absence of relevant cases has troubled some of the commentators. Nevertheless, Nimmer writes:

> "There is no reported case on the question of whether a single handwritten copy of all or substantially all of a protected work made for the copier's own use is an infringement or fair use. If such a case were to arise the force of custom might impel a court to rule for the defendant on the ground of fair use." [144]

Thus, "fair use" derives from two major sources, (1) customary use, and (2) other uses meeting certain criteria established by the courts. In both instances the courts have fashioned a common law doctrine independent of—and to some extent contradictory with—the copyright statute. Custom, therefore, is a basic source of "fair use". When such customary use is established, "fair use" prevails independent of the other criteria applicable in the absence of custom.

C. The Evidence Shows Custom Prevailed Here

The undisputed evidence in the trial of this case shows a history of at least 50 years of photocopying in

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[143] WILLISTON ON CONTRACTS, Section 649.

[144] NIMMER ON COPYRIGHTS, Sec. 146, p. 654 (1972). *Per contra:* Cohen, *Fair Use in the Law of Copyright*, ASCAP, COPYRIGHT LAW SYMPOSIUM, No. 6 (1955), 42 at 51; Crossland, *The Rise and Fall of Fair Use; The Protection of Literary Materials Against Copyright Infringement by New and Developing Media*, 20 So. CAR. L. REV. 153, 154, 166 (1968).

library systems. Plaintiff's own witness, Karl F. Heumann, Executive Editor of the Federation of American Societies for Experimental Biology, replied to questions as follows:

> "Q. Are you familiar with library photocopying?
> A. Reasonably familiar.
> Q. How long would you say that has been going on?
> A. Fifty years.
> Q. Would you say that is the custom?
> A. Yes." [145]

The Director of the National Library of Medicine, Dr. M. M. Cummings, testified that copying has been "going on more than 50 years." [146]

There is other solid documentary evidence that the Library of Congress had a custom of copying, including photocopying, dating back at least until 1901, [147] and that after the enactment of the current copyright law in 1909, the Library of Congress continued and expanded this practice. [148] The former Acting Librarian of Congress, Verner Clapp, wrote:

> "Back in 1901, the regulations of the Library of Congress freely permitted photocopying, a room being reserved for the purpose, and this permission specifically ran to articles covered by copyright." [149]

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[145] T. 430-1.

[146] T. 455. See also Respondent's Exhibits No. 51, 74, and T. 431, 836.

[147] See Brief *Amicus Curiae* of Association of Research Libraries, *et al.*, before Commissioner, pp. 13-4.

[148] *Ibid.*, pp. 21 *et seq.*

[149] V. Clapp, *Can Copyright Law Respond to the New Technology*, 64 LAW LIBRARY J. 387 (No. 4, Nov. 1968).

Undisputed testimony in this case by the Deputy Director of the National Medical Library, Scott Adams, reaffirms this statement by Verner Clapp:

> "Let me say that this code of practice—that it is rooted in custom; it goes all the way back to the beginnings of the century, or even before the beginning of the century . . . During the intervening years this has become a well-established custom, a well-established practice." [150]

Apropos of this historical evidence of custom for library photocopying, it is pertinent to note that this Court has held, in another context, that where usages and procedures were in actual practice at the time legislation was enacted, it must be reasonably assumed that they became an accepted part of the legislation. [151]

The relevance and importance of customary use to "fair use" is especially important in America's schools. At the end of the October 1973 term, this Court relied very heavily on "tradition in public education" [152] a reliance likewise accepted by the concurring opinion of Mr. Justice Stewart (at p. 5261). In the schools of this nation there has been a custom that is at the least traditional and may extend from time immemorial, to make reasonable use and copies of copyrighted materials for non-profit educational purposes without specific permissions or consents from the copyright owners. This tradition and custom has, *in itself,* be-

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[150] T. 837-8.

[151] *Foti* v. *Immigration and Naturalization Service,* 375 U.S. 217, 223 (1963).

[152] *Millikin et al.* v. *Bradley et al.,* 418 U.S. , 42 L.W. 5249, 5237 (July 24, 1974).

come the legally permissible standard for "fair use" in such schools.

D. Common Sense Approach

". . . common sense often makes good law", said Mr. Justice Douglas.[153] After all, society's purpose in creating and fostering libraries as institutions for the preservation of culture is, at least in part, to enable successive generations to study that culture and heritage for the advancement of science and the arts. ". . . and it has been the custom from time immemorial for scholars and others to hand copy."[154] Verner Clapp, former Acting Librarian of Congress, looked at this whole matter in perspective:

> "Now from very earliest times, this record keeping profession [librarians] has facilitated copying. It facilitated copying with cuneiform styles, with goosequill pens and fountain pens and ball-point pens, with typewriters, photostat cameras, microfilm cameras, and now with coin-operated photocopying devices. It has taken technology in its stride for at least 3,000 years . . ."[155]

In this connection there is significance in the so-called Gentlemen's Agreement of 1935, to which reference is made by the Court below (Finding of Fact No. 41) This Agreement included the following statement:

> ". . . a student has always been free to 'copy' by hand; and mechanical reproductions from copy-

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[153] *Peak* v. *U. S.*, 353 U.S. 43, 46 (1957).

[154] Petre, *Statutory Copyright Protection for Books and Magazines Against Machine Copying*, ASCAP, COPYRIGHT LAW SYMPOSIUM, No. 14 (1966), p. 180. (" . . . it is submitted that photocopying single copies for private research is a 'fair use'." p. 202).

[155] Clapp, *op. cit., supra* n. 149, at 399.

> righted material are presumably intended to take the place of hand transcriptions, and to be governed by the same principles governing hand transcriptions." [156]

It is respectfully submitted that this statement makes sense. It represented at the time not a new practice but rather a reaffirmation of an existing custom accepted by all concerned in the field of publishing and libraries.

If the law fails to accepts the common sense point of view and the custom recognized in the Gentlemen's Agreement, the following comment seems appropriate:

> ". . . we are in the ridiculous position of insisting that the scholar has a right to make a copy for his private use only if he does so under conditions of maximum inefficiency in the use of his time and resources . . . [157]

Custom is stabilized common sense, a recognition by society of a stabilized relationship between possible or actual adverse parties. As Mr. Justice Frankfurter said, ". . . words acquire scope and function from the history of events which they summarize". [158]

"Our concern is with realities, not nomenclature", said Mr. Justice McReynolds, [159] and Mr. Justice Brewer stated that ". . . courts must recognize things as they are . . ." [160]

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[156] Respondent's Exhibit 74.

[157] R. Shaw, *Publication and Distribution of Scientific Literature*, College and Research Libraries, Vol. XVII(4), 293 at 302 (July 1956).

[158] *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 186 (1941).

[159] *Senior* v. *Braden*, 295 U.S. 422, 429 (1935).

[160] *Adams Exp. Co.* v. *Ohio State Auditor*, 166 U.S. 185, 225 (1897).

The realities of the present situation are that "fair use" includes the custom of library photocopying in this case.

III. CONCLUSION

The specific issue before this Court is whether the judicial doctrine of "fair use" authorizes the Respondent's practice in this case. *Amicus* respectfully submits that it does.

The doctrine of "fair use" is merely a short-hand way of saying that the copyright proprietor does *not* have complete monopoly despite the statutory language. "The Copyright Act does not give a copyright holder control over all uses of his copyrighted work." [161] "It would be idle and trite to say that no right is absolute". [162]

The judicial doctrine of "fair use", which was developed in the face of a seemingly exclusive copyrighted privilege, is a recognition of the public interest against monopoly. And with good reason, for as Drone once stated of "fair use",

> "The recognition of this doctrine is essential to the growth of knowledge . . ." [163]

The judicial development of "fair use" is an example of what the distinguished legal philosopher Morris R. Cohen once said:

> "If judges never make law, how could the body of rules known as the common law ever have arisen or have undergone the changes which it has." [164]

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[161] *Fortnightly Corp.* v. *United Artists Television Inc.*, *supra* n. 113, at 393.

[162] *Orient Ins. Co.* v. *Daggs*, 172 U.S. 557, 566 (1869). See also *Dennis* v. *U.S.*, 341 U.S. 494, 508 (1951).

[163] Drone, *op. cit.*, *supra* n. 136, at 386-7.

[164] COHEN, LAW AND THE SOCIAL ORDER (1933), 112.

The fashioning of Federal remedies to protect Federal rights has been recognized by this Court over the years. Recently, for example, this Court said:

> "The remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress. Yet the remedies which Congress provides are not necessarily the only federal remedies available. 'It is not uncommon for federal courts to fashion federal law where federal rights are involved.' *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 457. When we deal with air and water in their ambient or interstate aspects, there is a federal common law, as *Texas* v. *Pankey* 441 F.2d, recently held." [165]

In such instances, this Court held that "There are no fixed rules that govern; . . .", and the Court's discretion prevails. [166]

> In *Textile Workers,* this Court said: "The range of judicial inventiveness will be determined by the nature of the problem." [167]

The present case calls for this same inventiveness in fashioning a remedy for the protection of Respondent's Federal constitutional and customary rights to continue the practice here involved. The doctrine of "fair use" is already in place and already codifies customary and acceptable practice. "Fair use"—as a common law doctrine—is not a static principle. It partakes of the common law's most characteristic trait, flexibility and sensitivity to changing developments,

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[165] *State of Illinois* v. *City of Milwaukee, et al.,* 406 U.S. 91, 103 (1972).

[166] *Ibid.,* at 106-7.

[167] *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 456-7 (1957).

societal demands, and the public interest at any given time. As Madison once put it, "no language is so copious as to supply words and phrases for every complex idea."[168] Few ideas in the law are as complex as "fair use".

In initiating and developing the "fair use" doctrine the Anglo-American courts have shown their "judicial inventiveness" and their sensitivity to the need for fashioning a remedy "where federal rights are involved".

The instant case cries out for the courts, once again to fashion the parameters of their own "fair use" doctrine so as to recognize the validity of constitutional protections, customary uses, and the public interest in the advancement of knowledge and the sciences, by protecting the practice here *sub judice*.

For all the foregoing reasons, the decision of the Court of Claims should be affirmed and the Respondent's photocopying practice in this case should be held to be authorized.

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[168] *The Federalist*, No. 37 (Cooke ed., 1961), at 236.

Submitted with the Consent of the Parties

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS CO.,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF AMICUS CURIAE OF THE AMERICAN LIBRARY ASSOCIATION

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INDEX

PAGE

TABLE OF AUTHORITIES i

QUESTION PRESENTED 1

INTEREST OF THE ALA 3

SUMMARY OF ARGUMENT 11

ARGUMENT 14

PRELIMINARY STATEMENT 14

POINT I

THE PREPARATION BY LIBRARIES OF SINGLE PHOTOCOPIES OF PORTIONS OF PERIODICALS AT THE REQUEST OF AND FOR THE USE OF SCIENTISTS, RESEARCHERS, AND SCHOLARS DOES NOT COME WITHIN THE AMBIT OF THE LIMITED MONOPOLY GRANTED PURSUANT TO THE COPYRIGHT ACT OF 1909 14

I. A. Introduction 14

I. B. Library Photocopying Was Recognized as Beyond the Copyright Laws Before and After the 1909 Revision 15

I. C. Recent Decisions of This Court Clearly Require a Holding That Traditional Library Photocopying Is Not Within the Limited Copyright Monopoly 21

POINT II

THE DOCTRINE OF FAIR USE PROVIDES A COMPLETE DEFENSE FOR TRADITIONAL LIBRARY PHOTOCOPYING 27

II. A. Introduction 27

II. B. Fair Use Permits Scientists, Researchers, and Scholars to Make Single Photocopies of Articles in Copyrighted Journals for Use in Research and Study 28

II. B. 1. Facts 28

II. B. 2. The Law of Fair Use Applied to the Facts 33

II. B. 2. a. Purpose of the "Use".. 37

II. B. 2. b. Nature of the Copyrighted Works 39

II. B. 2. c. The Amount and Substantiality of the Material Used in Relation to the Whole 40

II. B. 2. d. The Effect of the Use on a Copyright Owner's Potential Market for His Work 44

II. B. 2. e. Question 1 Should Be Answered in the Affirmative 49

II. C. The Fair Use Privilege of the Scientist, Researcher, or Scholar Is Not Destroyed When the Library, Acting As His Agent, Makes a Single Photocopy for Him At His Request ... 49

II. C. 1 Facts 50

II. C. 2 Question 2 Should Be Answered in the Negative 51

POINT III

PRACTICAL CONSIDERATIONS 55

III. A. Holding Operation 56

III. B. Library Photocopying Is Clearly Threatened in the Present Suit 56

III. C. Royalties on Library Photocopying Would Impose Onerous Economic and Administrative Burdens on Libraries 58

POINT IV

CONCLUSION 63

Appendix A A1

Appendix B A2

TABLE OF AUTHORITIES

Cases

Baker v. Selden, 101 U.S. 99 (1897) 36, 37, 40

Berlin v. E. C. Publication, Inc., 329 F.2d 541 (2d Cir. 1964) 48

Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968) 11, 15, 21, 22, 23, 24, 26, 47, 52

Fox Film Corp. v. Doyal, 286 U.S. 123 (1932) 47

Greenbie v. Noble, 151 F.Supp. 45 (S.D.N.Y., 1957) .. 38

Loew's Inc. v. Columbia Broadcasting System Inc., 131 F. Supp. 165 (S.D. Cal. 1955); aff'd 239 F.2d 532 (9th Cir. 1956); aff'd, 356 U.S. 43 (1958) 37, 40

National Institute, Inc. v. Nutt, 28 F.2d 132, (D. Conn. 1928) 43

Rosemont Enterprises, Inc., v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), cert. denied 385 U.S. 1009 (1967) 33, 39, 40

Sawyer v. Crowell Publishing Co., 46 F.Supp. 471 (S.D. N.Y. 1942) 61

Sayer v. Moore, 102 Eng. Rep. 139 (K.B. 1785) 33

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Thomson v. Gernsback, 94 F.Supp. 453, 454 (S.D.N.Y. 1950) 38

Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct.Cl. 1973), 180 U.S.P.Q. 49 (1972), cert granted, 42 U.S.L.W. 3652 (U.S. May 28, 1974) 14, 20, 29, 30, 32, 35, 36, 42, 45, 46, 50, 55, 57, 60, 62

Congressional Provisions and United States Statutes

U.S. Const. art. I, § 8 33

Act of March 4, 1909, ch. 320, 35 Stat. 1075 .....
.....9, 11, 14, 15, 21, 27

17 U.S.C. § 1(a) 11, 22, 51

17 U.S.C. § 3 61

17 U.S.C. § 8 60

17 U.S.C. § 101 39

17 U.S.C. § 107 43

17 U.S.C. § 116 39

28 U.S.C. § 1498(b) 2

Miscellaneous

Articles, Books and Other

Address to Herbert Putnam, Librarian of Congress 1899-1939, by the American Council of Learned Societies (Washington, D.C., January 27, 1939) 19

CODE OF PRACTICE FOR INTERLIBRARY LOANS (Constituting Report for 1917 of the Committee on Coordination, C. H. Gould, Chairman); ALA Bulletin V. 11 (1917) 6

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LIBRARY OF CONGRESS, RULES AND PRACTICE GOVERNING THE USE AND ISSUE OF BOOKS (eds. 1908, 1913, 1918, 1921, 1929, 1932, 1939)....
.....15, 17, 18

NATIONAL INTERLIBRARY LOAN CODE, 1968 .. 3

NIMMER ON COPYRIGHT (1971 Ed.) 41

Palmour, Vernon E., A STUDY OF THE CHARACTERISTICS, COSTS, AND MAGNITUDE OF INTERLIBRARY LOANS IN ACADEMIC LIBRARIES, (1972) 6, 7

REPORT OF THE LIBRARIAN OF CONGRESS (1901) 17

Sophar, G. and L. Heilprin, "The Determination of Legal Facts and Economic Guideposts with Respect to the Dissemination of Scientific and Educational Information as it is Affected by Copyright—A Status Report", Final Report, Prepared by the Committee to Investigate Copyright Problems Affecting Communication in Science and Education, Inc., for the U.S. Department of Health, Education and Welfare, Project No. 70793 (1967) ..28, 29

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REPORT OF THE LIBRARY OF CONGRESS (1969) 61

Bills and Reports of Congress

H.R. 19853, 59th Cong., 1st Sess. (1906) 16

H.R. Rep. No. 7083, 59th Cong., 2nd Sess. (1907) 17

H.R. Rep. No. 2222, 60th Cong., 2nd Sess. (1909) 48

S. 6330, 59th Cong., 1st Sess. (1906) 16

S. 1361, (amended), 93rd Cong., 2nd Sess. (1974) 56

Records and Briefs

Brief of American Chemical Society as amicus curiae ... 23

Brief for Authors League of America, Inc., as amicus curiae 22, 45

Petitioner's Brief 2, 14, 22, 27, 29, 35, 40, 43, 44, 61, 62

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IN THE

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THE WILLIAMS & WILKINS CO.,

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THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF AMICUS CURIAE OF THE AMERICAN LIBRARY ASSOCIATION

QUESTION PRESENTED

The question to which the American Library Association (the "ALA") addresses itself (and to which it addressed itself in its previous *amicus curiae* briefs directed to Commissioner Davis and to the United States Court of Claims) is:

> Whether not-for-profit academic, research, and public libraries are liable for copyright infringement as a result of their long-standing practice of making single photocopies of portions of copyrighted works at the request

and for the use of readers engaged in scientific and scholarly research.

The instant case superficially presents the somewhat narrower question of liability of the United States for damages (but not an injunction) under 28 U.S.C. Section 1498(b) attributable to library photocopying. Yet, it has been uniformly recognized by Commissioner Davis, the Court of Claims, the parties, and all *amici* that the decision herein will have a profound effect on judicial treatment of all library photocopying[1] at least until Congress acts on the question of library photocopying—including the very serious potential of an injunctive bar against the time honored practice of copying from library materials for scientific and scholarly research purposes.

Commissioner Davis recommended that the case before him be decided in favor of the plaintiff-publisher, thereby advocating that library photocopying as currently practiced be held to constitute copyright infringement. However, the Court of Claims did not accept the Commissioner's recommendation and held that the library photocopying, as represented in the record before it, did not infringe the copyrights in which the plaintiff-publisher claimed ownership. Affirmance of the Court of Claims decision will offer significant protection to libraries in the fulfillment of their traditional role as disseminators of recorded knowledge in the interim before Congress specifically legislates protection for this role. Correspondingly, reversal will significantly disrupt established procedures for promoting scientific knowledge and research.

1. For example, Petitioner concedes, as it must (see Petitioner's Brief page 29; hereinafter "Pet. Br." followed by the page reference therein), that this case will constitute precedent whose potential and probable effect transcends the interests of the instant litigants.

INTEREST OF THE ALA

The ALA, founded in 1876, is a non-profit educational organization with its principal place of business located in Chicago, Illinois. Its membership includes libraries, librarians, library trustees, and members of the general public who are devoted to the development and improvement of library services in the United States.

The ALA is the chief spokesman for the modern library movement in North America and, to a considerable extent, throughout the world. Through its membership and its affiliation with its constituent state library associations, the ALA represents over 24,000 public, university, and special libraries, over 90,000 elementary and secondary school libraries and media centers, and over 120,000 librarians.

The primary objective of the ALA is "to promote library service of excellent quality freely available to all." The ALA has long considered the collections of American Libraries as a truly national resource—a resource to which all citizens should have access. Consistent with this view, the ALA has encouraged the development of a system of interlibrary loans under which the library resources of the country can be maximized and made nationally available. This system functions in accordance with the Interlibrary Loan Code,[2] which, by its

2. The ALA's NATIONAL INTERLIBRARY LOAN CODE, 1968, provides in relevant part as follows:

* * * * *

"On a national level interlibrary loan requests should be *restricted to materials which cannot be obtained readily* and at moderate cost *by other means*.

I. *Definition*

Interlibrary loans are transactions in which library materials *are made available* by one library to another for the use of an individual; for the purposes of this code they include the pro-

terms, provides for the protection of authors and publishers against abuse. Under this system the poorest, most remote community or library, in behalf of those it serves, can gain access

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vision of copies as substituted for loans of the original materials.

II. *Purpose*

The purpose of interlibrary loans is to make available *for research*, materials not owned by a given library, in the belief that the furtherance of knowledge is in the general interest. Interlibrary loan service *supplements* a library's resources by making available, for the use of an individual, materials from other libraries and not owned by the borrowing library.

III. *Responsibility of Borrowing Libraries*

1. It is assumed that each library will provide the resources to meet the study, instructional, informational, and normal research needs of its users, and that requests for materials from another library will be limited to unusual items which the borrowing library does not own and cannot readily obtain at moderate cost. Requests for individuals with academic affiliations should be limited to those materials needed for faculty and staff research, and the thesis and dissertation research of graduate students.
2. Thesis topics should be selected according to the resources on hand and should not require extensive borrowing from other libraries. If an individual needs to use a large number of items located in another library, he should make arrangements to use them at that library.

* * * * *

V. *Scope*

1. Any type of library material needed for the purpose of research may be requested on loan or in photocopy from another library. The lending library has the privilege of deciding in each case whether a particular item should or should not be provided, and whether the original or a copy should be sent.
2. Libraries should not ordinarily ask, however, to borrow the following types of materials:
   a. U.S. books in print of moderate cost
   b. Serials, when the particular item needed can be copied at a moderate cost
   c. Rare materials, including manuscripts
   d. Basic reference materials

* * * * *

to the collections of the great academic and public libraries. By reason of this system, scholarship is not dependent on geographical location or the wealth of any particular community or individual, and the intellectual resources of the nation are available to all who desire or need them.

This system of interlibrary loan is not new. The first Interlibrary Loan Code was adopted in 1917; the second in 1951; the third in 1952, and the current Code, see n.2 *supra*, was adopted in 1968. Through all of this development, the basic objective of maximizing national library resources and the manner of making those resources available have remained the same.

Since its inception, the system of interlibrary loan has operated on the understanding that a library is free to use a photocopy in lieu of lending the original in its collection. This was made clear in 1917 by the first Interlibrary Loan Code, which specifically stated:

VII. *Conditions of Loans*

* * * * *

2. The borrowing library is bound by any limitations on use imposed by the lending library. It is recommended to lending libraries that any limitations (such as "for use in library only") be based on the physical condition or the bibliographic character of the particular item rather than be imposed on all materials lent.

3. Unless specifically forbidden by the lending library, copying by the borrowing library is permitted provided that it is in accordance with copyright law and American Library Association policy.

VIII. *Placement of Requests*

1. Libraries should exhaust local resources and make an effort to locate copies through the use of bibliographical tools, union lists, and union catalogs. Requests should be made to one of the nearer institutions known to possess the desired material. Care should be taken, however, to avoid concentrating requests on a few libraries.

* * * * *

> When applying for a loan, if a photographic reproduction would be a satisfactory substitute, librarians should always state the fact.[3]

All subsequent revisions of the Code have made similar provision for photocopying in lieu of lending the original. Until Petitioner brought the present suit, the right of a library to substitute a photocopy for the original was unquestioned and unchallenged.

The use of photocopies in interlibrary loan transactions is and has always been primarily confined to those involving requests for articles from periodicals. A recent study of Interlibrary Loan Transactions shows that over 84% of requests for periodical articles are satisfied by photocopies and microforms, as compared with less than 3.9% of requests for monographs.[4] There are good reasons for this.

First, periodical publications are normally collected and bound by librarians. Hence, a single volume may contain issues spanning one or more years and containing hundreds and even thousands of articles. Libraries photocopy a requested article from a periodical instead of sending the bound volume in which the article is contained simply because the library cannot do otherwise and still fulfill the needs of its own users. To send the bound volume instead of the photocopy would be to make available one work at the expense of making unavailable the numerous other works contained in the bound volume.

Second, periodical publications are inherently more difficult to preserve than are monographs, since periodicals are generally printed on less durable paper and hence are more susceptible to damage. Moreover, periodicals, once damaged or destroyed, are significantly more difficult to replace than are monographs.

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3. CODE OF PRACTICE FOR INTERLIBRARY LOANS (Constituting Report for 1917 of the Committee on Co-ordination, C. H. Gould, Chairman); *ALA Bulletin* V.11, p. 271 et seq. (1917).

4. Palmour, Vernon E., A STUDY OF THE CHARACTERISTICS, COSTS, AND MAGNITUDE OF INTERLIBRARY LOANS IN ACADEMIC LIBRARIES, Table 4.15 at 44 (1972).

Libraries rarely attempt to preserve issues of more than a few of the periodicals to which they subscribe because of the burdensome cost and space commitments involved. Likewise, few individuals keep back issues of the periodicals to which they subscribe. Moreover, periodical publishers themselves are rarely able to fill orders for back issues.

Third, the use of photocopies in lieu of the original significantly expedites user access to desired material. Studies show that 61.2% of interlibrary loan requests are satisfied within ten days when photocopies are used as compared with only 43.3% for the same time period where the original work is lent.[5]

The present case and its potential effect on library photocopying, of course, is also of concern to libraries in their day-by-day service to scholars, researchers, and scientists. It is impractical and unrealistic for a library, both from an economic point of view and from an allocation of space perspective, to purchase countless duplicates of the journals and periodicals in its collections. The demand for any given periodical quite logically varies from month to month and indeed from day to day. To supply such an unpredictable demand with original copies and still maintain some degree of efficiency is quite obviously impossible. Moreover, periodicals and journals, with the exception of recent issues, cannot readily be replaced and in some cases can never be replaced. To deviate from the norm of supplying photocopies would necessitate continually risking loss or destruction of the original while depriving subsequent patrons of access to the journal during the loan period.

Clearly, both from the standpoints of the Interlibrary Loan Program and the day-by-day library function of making its resources available, unencumbered photocopying is an absolute necessity.

The interest of the ALA in the present case arises from the fact that a decision in favor of Petitioner would almost certainly make it impossible for nearly 85% of all interlibrary loan

5. Palmour, *supra* note 4, Table 4.21 at 48.

requests for periodical works to be satisfied and would impede the normal function of libraries serving their own patrons. For the reasons already stated, libraries simply will not loan their bound volumes of periodicals. Such a decision would, therefore, bring to a halt the day-by-day dissemination of articles within bound volumes of periodicals.

Should Petitioner prevail in its contention that the making of a photocopy in an interlibrary loan transaction or in response to a request by a patron of a local library is an infringement of copyright, libraries will have but three alternatives;

(1) refuse the request;

(2) risk a suit for infringement and provide a photocopy; or

(3) seek permission from the copyright owner to photocopy.

Of these alternatives, the only viable decision will be to refuse the request, and library utilization of previously copied materials will be subject to the whim of copyright proprietors.

Manifestly, libraries cannot risk a suit for infringement. As governmental or educational institutions on limited budgets, libraries must attempt to avoid litigation. In any event, no non-governmental library would dare expose itself to claims for statutory damages for infringement in respect of every interlibrary loan transaction or local transaction where a photocopy is necessary. Such exposure, even if limited to the statutory minimum, would exceed the annual budgets of many large libraries.

Nor can libraries realistically be expected to seek permission from the copyright proprietor to make a photocopy. The prodigious delays alone would be enough to dissuade many libraries from seeking permission, not to mention the administrative costs of staggering proportions which would necessarily be incurred. To secure such permissions and collect and account for royalties in respect of each transaction would most surely involve the

expenditure of dollars by the library to collect pennies for the copyright proprietor. For that reason alone, no matter how important the local need or the interlibrary loan may be, no library can be expected to continue its normal practices in a system, the cost or burden of which endangers its very existence.

What is involved in this case is a demand by Petitioner for recognition of its right to *absolutely prohibit* the making of photocopies for local requesting scholars as well as for interlibrary loan purposes by any library whose potential liability is not limited to "reasonable compensation". The fact that Petitioner seeks only "reasonable compensation" (royalties) from the United States in the instant suit is no comfort to the vast majority of ALA's members, since injunctive relief, which is unavailable in the present case, would be available—and will be sought—against non-governmental libraries. As applied to libraries which are not part of the Federal Government, a decision in favor of Petitioner would give it and all other copyright proprietors the absolute power to suppress access to their copyrighted works and consequently to much of the nation's library resources.

If the photocopying of a copyrighted work incident to an interlibrary loan transaction, for example, is deemed an infringement, the copyright proprietor may refuse to permit library photocopying on reasonable terms or, for that matter, on any terms at all. The Copyright Act of 1909 contains no provision for mandatory licensing of copyrighted writings corresponding to that for phonorecords. Should the copyright proprietor fail to respond to requests to photocopy, for whatever reason, access to the desired work will be limited to those having physical access to the library collection in which it is preserved.

The ALA submits that the Constitution did not intend the copyright monopoly to suppress access to works necessary "To promote the Progress of Science and useful Arts". Nor did the Congress, which adopted the Copyright Act of 1909, intend this result. The Copyright Act of 1909 must be construed to

achieve and not defeat the Constitutional purpose of promoting science and the useful arts. If there is to be a further expansion of the copyright monopoly, it should be accompanied by those delicate safeguards and balancing mechanisms which only the Congress can provide.

In the modern world, access to the information contained in periodical publications is essential to human progress. The interest of the ALA in this case is its interest in preserving such access. Unless, by its decision here, this Court protects the access to periodicals available through library photocopying, scholarship, research, and science will be confined to those few communities and institutions fortunate enough to possess sizeable library collections. Individual opportunity for contribution to science and the useful arts will then and thereafter become a function of economic concentration and geography. The goal of library collections as a single national resource available to all who need or desire access will be shattered, and the nation and its citizens will bear the loss.

SUMMARY OF ARGUMENT

A. The Constitutional purpose underlying the Copyright Act of 1909 is to promote science and the useful arts. Section 1(a) of that Act enumerates several "exclusive rights", the conferral of which creates in authors monopoly powers with respect to the exercise of those rights. Those monopoly powers are necessarily restricted as to their scope in order to further, rather than impede, the constitutional purpose for which they were conferred.

B. The legislative history surrounding the 1909 enactment of Section 1(a), as well as prevailing practices of that era and up to the present time, support a finding that library photocopying practices were intended to be, and have always been construed as being, outside the scope of the limited copyright monopoly. Present day library photocopying practices are distinguishable from earlier photocopying practices only in terms of the "quantity" of material being photocopied. That which was not intended to be, and has never been considered to be, within the scope of the limited copyright monopoly should not now be brought within its scope by judicial action merely because the "quantity" of materials being copied has increased.

C. What Petitioner argues for in the instant case is an *extension* of the copyright monopoly to cover a process whereby recorded knowledge is made available through a medium separate and distinct from that with which publishers are concerned. As noted in this Court's recent decisions in the cases of *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corporation* v. *Columbia Broadcasting Systems, Inc.*, ... U.S. ....., 39 L.Ed.2d 415 (1974), such an extension is made only after a compelling showing that the functions of the copyright owner and the alleged infringer are the same. That showing cannot be made here. As in the

Fortnightly and *Teleprompter* cases, all the library photocopying practices do is make access to printed journal articles available to those persons who could not otherwise obtain such access. Semantic niceties and quantitative considerations cannot overcome the functional distinction between publishing and library photocopying activities.

D. Library photocopying practices, if somehow deemed within the scope of the limited copyright monopoly, should nevertheless be excused as non-infringing in accordance with the doctrine of "fair use". Libraries merely do for researchers that which researchers themselves have always been entitled to do. As a practical matter, libraries are mere agents of researchers acting only in accordance with and at the requests of their principals.

Scientists, researchers, and scholars are entitled to assert the doctrine of fair use in defense of their practice of obtaining access to journal articles in the form of single copies for practical application in their work. The fair use doctrine is bottomed on policy which supports both limited copying for direct quotation in subsequent publications and total copying to facilitate access to, and practical application of, recorded knowledge for purposes of advancing science and the useful arts. The fair use exception involving limited copying for use in subsequent publications assumes access to copyrighted materials. Accordingly, access to, and practical application of, copyrighted materials has heretofore never been challenged, and this case therefore poses questions of first impression. Using the recognized copying for use in subsequent publications, single photocopying for purposes for access and practical application is *a fortiori* entitled to exception from a limited copyright monopoly.

E. Since scientists, researchers, and scholars are entitled to assert the fair use defense, the defense is not destroyed when libraries, who act as mere agents of these patrons, make single photocopies for them at their request. Libraries do

nothing more than enhance their patrons' access to recorded knowledge. To hold libraries liable for copyright infringement in respect of this traditional service would necessarily bring an end to library photocopying. Such a result would deprive researchers of their right to assert the fair use defense in the protection of their privilege of free access to, and practical application of, copyrighted materials.

F. A decision for Petitioner—that single photocopy practices of libraries constitute infringement—would bring an end to library photocopying practices and consequently greatly inhibit dissemination of and access to recorded knowledge. Petitioner's suggested licensing program is wholly unacceptable and would not avoid the foregoing consequences.

G. Congress is considering copyright revision statutes which will accommodate the competing interests presented in this case. It is inappropriate for this Court to undertake the legislative process of extending the limited copyright monopoly by bringing within its ambit that which is clearly beyond its reach.

ARGUMENT

Preliminary Statement

Petitioner argues that the challenged library photocopying practices are a *per se* violation of the Copyright Act of 1909. (Pet. Br. 22 *et seq.*) For Petitioner to prevail in this argument, this Court must be satisfied on two points: (1) that library photocopying *prima facie* infringes the monopoly granted to copyright owners under the Act; and (2) that, if there is a *prima facie* violation, the defense of fair use is inapplicable to excuse it.

The majority of the Court of Claims, not surprisingly, refused to accept the argument that a practice that had gone unchallenged from the inception of the Act until the institution of the present suit constituted a *per se* violation. (*Williams Wilkins Co.* v. *United States*, 487 F.2d 1345, 1353 (Ct.Cl. 1973)) And, in finding there was no violation *at all*, it held both that there was substantial doubt whether the challenged practice was within the ambit of the Act's limited monopoly, and that in any event the practice constituted a fair use. Its doubt as to the former point reinforced its conclusion on the latter.

POINT I

THE PREPARATION BY LIBRARIES OF SINGLE PHOTOCOPIES OF PORTIONS OF PERIODICALS AT THE REQUEST OF AND FOR THE USE OF SCIENTISTS, RESEARCHERS, AND SCHOLARS DOES NOT COME WITHIN THE AMBIT OF THE LIMITED MONOPOLY GRANTED PURSUANT TO THE COPYRIGHT ACT OF 1909

I. A. Introduction

Perhaps emboldened by the majority's failure fully to accept the proposition that traditional library photocopying is not within the ambit of the Copyright Act's limited monopoly,

Petitioner persists in ignoring this question and focuses instead on the "fair use" defense. Of course this is the position Petitioner must take if it is to succeed in its *per se* approach. But the "scope of monopoly" question is not so easily sidestepped. There has never been a judicial determination that library photocopying is a *prima facie* violation of the Copyright Act of 1909. That is a question of first impression in this Court. And, as will be seen from the discussion below, it is clear that this traditional practice was initially intended to be, and should remain, outside the scope of the Act.

Moreover, a determination that library photocopying practices are outside the scope of the Act is consistent with two recent decisions of this Court—*Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corporation* v. *Columbia Broadcasting Systems, Inc.*, ... U.S. ....., 39 L.Ed.2d 415 (1974). Applying this Court's reasoning in those cases (hereinafter "CATV cases") to the instant one, it is clear that library photocopying is beyond the Act's reach.

I. B. Library Photocopying Was Recognized as Beyond the Copyright Laws Before and After the 1909 Revision

To assess the meaning and reach of the "exclusive rights to print, reprint, publish, copy and vend" contained in Section 1(a) of the Copyright Act on which Petitioner relies, it is essential to consider the interpretation given those rights as they related to library photocopying activities before, during, and after the 1909 revision which resulted in the present Act. Prevailing interpretations of those exclusive rights over the years since 1900 are set forth in a series of "Rules"[6] updated and published from time to time by the Library of Congress.

Important to this history is the role of Dr. Herbert Putnam, who served as Librarian of Congress both before and after the

6. LIBRARY OF CONGRESS, *RULES AND PRACTICE GOVERNING THE USE AND ISSUE OF BOOKS* (eds. 1908, 1913, 1918, 1921, 1929, 1932, 1939).

enactment of the 1909 revision. His involvement began in 1905 when the Senate Committee on Patents, after receiving a Presidential message in December of 1905 requesting prompt action on needed copyright revisions, asked Dr. Putnam to call a conference with the Register of Copyrights for the purpose of discussing revision of the then existing Copyright Laws.[7] Pursuant to that request, conferences were convened, with authors, book publishers, periodical publishers, and representatives from libraries in attendance.

Following the conferences, the Register of Copyrights drafted a bill which was presented in open hearings to a joint committee of the House and Senate Committees on Patents during the First Session of the 59th Congress in June 1906.[8] Dr. Putnam presented the bill and served as its leading proponent before the joint committee.

The libraries objected to the original formulation because the practices prohibited in Section 1(b) thereof (see n. 8 *supra*) could be interpreted as reading upon their regularly provided services (including their photocopying services). Realizing its potential effect on normal library practices, the House Committee on Patents deleted Section 1(b), and with reference to its action stated:

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7. See Goldman, *THE HISTORY OF U.S.A. COPYRIGHT LAW REVISION 1901-1954*, 1-2 (1955).

8. LIBRARY OF CONGRESS, THE COPYRIGHT BILL: S. 6330, H.R. 19853, 59th Cong., 1st Sess. (Copyright Office, Library of Congress, Bulletin No. 12, 1906); Section 1 of H.R. 19853 and S. 6330 provided in pertinent part:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the copyright secured by this Act shall include the sole and exclusive right:
>
> (a) For the purposes set forth in subsection (b) hereof, to make any copy of any work or part thereof the subject of copyright under the provisions of this Act, or to abridge, adapt, or translate into another language or dialect any such work, or make any such version thereof;
>
> (b) To sell, distribute, exhibit, or let for hire, or offer or keep for sale, distribution, exhibition, or hire, any copy of any such work;

> It was insisted that this paragraph would prevent the purchaser of a copyrighted book from reselling it or lending it or giving it away or the letting for hire of any such book, thus putting an end to circulating libraries. Your committee believed that this section was susceptible of that construction and that under it a man might have only qualified title in the copyrighted books in his library. This entire paragraph was eliminated, and in this bill the phraseology of the existing law has been substantially reproduced . . . (H.R. REP. No. 7083, 59th Cong., 2d Sess. 8 (1907)).

Thus it is obvious that Congress was sensitive to the needs and desires of the libraries and had no intent to interfere with or change the then normal library practices, which permitted photocopying.

At about the same time, in 1908, photography was gaining popularity as a means to facilitate copying. In this setting, Dr. Putnam, the Librarian of Congress, was intimately familiar with the pending copyright revisions and presumably congressional intention with respect thereto, and he was instrumental in promulgation of the 1908 edition of the "Rules", which expressed the then existing library policy[9] on photography as follows:

> *Photographing.* Photographing is freely permitted. The permission extends to the building itself and any of its parts, including the mural decoration. *It extends to articles bearing claim of copyright,* but the Library gives no assurance that the photograph may be reproduced or republished or placed on sale. These are matters to be settled with the owner of the copyright. (Emphasis added.)

The legislative history concerning the 1909 Act is devoid of any suggestion that would support an inference contrary to that manifest from the foregoing background—that Congress did not intend for library photocopying to be covered by the

9. The Library policy on photography did not originate with the 1908 revision but rather appears to date back to at least 1901. *See* REPORT OF THE LIBRARIAN OF CONGRESS, at 208 (1901).

Act. It is virtually inconceivable that a Congress so sensitive to the interests of libraries would enact a Copyright Law which would affect the normal library practices of that time. Nor does it seem likely that Dr. Putnam, Librarian of Congress, would support inclusion of a provision contrary to the already published 1908 edition of the Library Rules.

Indeed, the actions of the Library of Congress under the direction of Dr. Putnam support precisely the opposite conclusion—that the language of Section 1(a) was not intended to, and did not, bring library photocopying within the ambit of the limited copyright monopoly.

That conclusion is further manifest from post-1909 actions of the Library of Congress. Rather than change the Rules governing "photographing" after passage of the Copyright Act (which it would logically have done if such practices had been made infringements under Section 1[a] of the Act), in 1913 the Library published a new edition,[10] in which rules regarding photocopying were broadened to include the following provision:

> Photo-duplicates of books, newspapers, maps, etc., can be furnished at a reasonable rate by means of a photostat, installed in the Chief Clerk's Office. Apply to the Chief Clerk for a schedule of charges.[11]

Thus, it is clear that the Library of Congress, whose librarian, Dr. Putnam, piloted passage of the Copyright Act of 1909, did not consider its photocopying practices to be inconsistent with the "exclusive rights" conferred on authors by Section 1(a) of that Act.

The provisions of the 1913 edition of the Rules were continued in essentially the same form for three decades, until 1939 when Dr. Putnam retired from his post as Librarian.

10. LIBRARY OF CONGRESS, *RULES AND PRACTICE GOVERNING THE USE AND ISSUE OF BOOKS* (1913). The Library's staff reports there was a 1911 edition, but to the ALA's knowledge no copy of this publication has been located.

11. *Id.*

Dr. Putnam's departure from the Library was commemorated by the American Council of Learned Societies, which, in praising his work at the Library, stated:

> You have led in adapting the most modern photographic processes to the needs of the scholar, and have . . . made widely available for purposes of research copies of your own collections . . .[12]

A majority of the Court below characterized the foregoing summary of significant events extending from before 1909 until 1939 as an:

> . . . [I]lluminating slice of history, covering the time of enactment and the first three decades of the 1909 Act, [which] *should not be ignored.* (487 F.2d at 1351; emphasis supplied.)

Moreover, significant events supporting the ALA's argument —that library photocopying is, and always has been, beyond the limited copyright monopoly—occurred after Dr. Putnam's retirement in 1939. The Library of Congress, for example, continued to recognize the need for some measure of reprography particularly for study, scholarship, and research and currently serves its patrons by providing the equipment necessary for photocopying.[13]

And the more recent evidence is not limited to the Library of Congress practices. As pointed out by the majority below, library photocopying has long been recognized as permissible—receiving implicit Congressional approval in 1956 and 1965:

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12. Address to Herbert Putnam, Librarian of Congress 1899-1939, by the American Council of Learned Societies (Washington, D.C., January 27, 1939), second page of text.

13. The Library presently maintains machines which readers may use for photocopying; these machines contain notices saying that *"a single photocopy of copyrighted material may be made only for the purpose of study, scholarship, or research,* and for no other purpose" and "the sale and/or further reproduction of any photocopied copyrighted material is illegal."

> There is other evidence that, until quite recently, library photocopying was carried on with apparent general acceptance. Witnesses in this case testified that such photocopying has been done for at least fifty years and is well-established. The National Library of Medicine Act, in 1956, by which NLM was created (42 U.S.C. § 275 et seq.) provided at § 276(a)(4) that the Secretary of Health, Education, and Welfare, through NLM, should *"make available, through* loans, *photographic or other copying procedures* or otherwise, such materials in the Library as he deems appropriate * * * "; and the Medical Library Assistance Act of 1965 (42 U.S.C. § 280b-1 et seq.) provided that grants be made to medical libraries for, among other things, *"acquisition of duplication devices,* facsimile equipment* * * and other equipment to *facilitate the use of the resources of the* library," 42 U.S.C. § 280b-7. These two pieces of legislation indicate to us that Congress knew in 1956 and 1965 of the practice of library photocopying, and assumed that it was not beyond the pale. (487 F.2d at 1356; emphasis supplied.)

The revealing history outlined above, covering the period from the turn of the century until just recently, clearly warrants a finding that library photography practices were, and remain, outside the intended scope of the limited copyright monopoly.

Clearly, that which was not intended by Congress to be covered by the exclusive rights of Section 1(a), and has never been considered within the reach of those rights, should not now—by judicial action—be brought within that reach. If library photocopying for its salutary purposes is to be subjected to the exclusionary power of a copyright monopoly, the legislature should be the instrument for resolving the delicate balancing of interests that must be faced.

I. C. Recent Decisions of this Court Clearly Require a Holding That Traditional Library Photocopying Is Not Within the Limited Copyright Monopoly

As pointed out above, the legislative history concerning, and the practice for many decades under, the Copyright Act of 1909 clearly suggests that the library photocopying at issue here was never intended to be, and has never been considered to be, within the ambit of the limited copyright monopoly conferred in that Act. The recent decisions of this Court in the CATV cases—*Fortnightly* and *Teleprompter*—provide firm support in a completely analogous context for this conclusion.

In *Fortnightly*, this Court began by pointing out that the Copyright Act is, indeed, limited and not all-encompassing:

> The Copyright Act does not give a copyright holder control over all uses of his copyrighted work. Instead, § 1 of the Act enumerates several "rights" that are made "exclusive" to the holder of copyright. If a person, without authorization from the copyright holder, puts a copyrighted work to use within the scope of one of these "exclusive rights," he infringes the copyright. If he puts the work to a use not enumerated in § 1, he does not infringe. (392 U.S. 393-95, footnotes omitted.)

At issue in the *Fortnightly* and *Teleprompter* cases was whether CATV systems, in utilizing sophisticated electronic equipment to bring copyrighted television programs to viewers who could not otherwise receive such programs, infringed the exclusive "performance" rights granted to the owners of the copyrights in those programs pursuant to Sections 1(c) and 1(d) of the Copyright Act.

That issue is, of course, quite similar to the issue presented herein, namely, whether libraries in utilizing reprographic technology to provide their patrons with access to articles in copyrighted journals in the form of single photocopies (which is

their only practical means of access) infringes the rights granted to the persons claiming ownership of copyrights in those journals pursuant to Section 1(a) of the Act. Just as the activities of CATV were determined to be outside the scope of the copyright monopoly, so should library photocopying be found to be outside the scope of Section 1(a).

The conceptual analogy between the CATV practices and library photocopying is apparent. Both involve a function separate and distinct from the role traditionally played by copyright proprietors. This point was emphasized in *Fortnightly* as follows:

> The function of CATV systems has little in common with the function of broadcasters.*

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* Cf. *Intermountain Broadcasting & Television Corp.* v. *Idaho Microwave, Inc.*, 196 F.Supp. 315, 325:

> "[Broadcasters] and [CATV systems] are not engaged in the same kind of business. They operate in different ways for different purposes. . . ." (392 U. S. at 400.)

What CATV does is, in essence, pick up where the broadcasters leave off. In this sense this Court looked upon CATV as a separate and different medium for dissemination.

And, of course, the same is true of library photocopying. This is tacitly admitted by Petitioner, when it says in its Brief:

> The economic incentive underlying copyright protection is operative when *various media of dissemination, both old and new,* are utilized. Compensation is appropriate whether or not use *in a medium* cuts into income from *established forms of exploitation.* (Pet. Br. at 18; emphasis supplied.)

and is candidly admitted by one of Petitioner's *amici:*

> This systematic reproduction of articles on demand is a *separate medium* for distributing them . . . (Brief of Authors League of America, at 7; emphasis supplied).

It is thus apparent that, in the instant case as in *Fortnightly* and *Teleprompter,* what Petitioner is, in fact, arguing for is an

extension of the copyright monopoly to a medium of dissemination separate and distinct from that traditionally occupied by journal publishers.[14] As was made clear in the CATV cases, such an extension is not automatically made upon the bare assertion that the separate medium is one to which the proprietor's right *should extend*.

In the CATV cases, as noted above, the question at issue was whether CATV activities amounted to a "performance" of the copyrighted television programs within the meaning of the Copyright Act. Obviously, this question could have been treated as one of pure semantics, and on this basis the term "performance" was susceptible of a definition which would include the CATV practices. However, this Court refused to limit its consideration to semantic niceties:

> [O]ur inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here. (392 U.S. at 395; footnote omitted.)

In the same manner, and contrary to the assertions of Petitioner, the instant case cannot and should not be determined on the basis of the *in vaccuo* meanings of the terms "print, reprint, publish, copy and vend" as they appear in Section 1(a) of the Copyright Act. Moreover, in contrast to the situation presented in the CATV cases, the practice at issue here is not one which came into being only recently, making legislative history and the history of the Act's practical application of no value to its interpretation. As has been pointed out above, photocopying or more appropriately, its photographic eqivalent, was being utilized as a separate medium for dissemination at the time of

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14. Another of Petitioner's *amici* confirms the nature of Petitioner's argument and further reveals the motive behind Petitioner's efforts to extend its copyright monopoly:

> The petitioner . . . instituted this action in order to . . . *broaden the financial support* for the ever-increasing costs of privately published, scientific journals . . . (See Brief for American Chemical Society as *amicus curiae* at 16).

the Act's passage and has proceeded without challenge under the Act for many decades. Thus, this case does not present a new technological phenomenon not anticipated by the Act's drafters. Library photocopying was known in 1909 and the language included in Section 1(a) was not intended to embrace this activity.

Petitioner, tacitly admitting the foregoing, nevertheless argues that the present extent of the practice was not quantitatively anticipated. In view of the fact that library photocopying has increased with improvements in reprographic technology, Petitioner's argument continues, it is likely that the practice would have been proscribed if its quantitative parameters had been anticipated. However, as further pointed out in *Fortnightly:*

> But mere quantitative contribution cannot be the proper test to determine copyright liability in the context of television broadcasting . . . Rather, resolution of the issue before us depends upon a determination of the function that CATV plays in the total process of television broadcasting and reception. (392 U.S. at 396-97.)

The same point was made in *Teleprompter*, as follows:

> These shifts in current business and commercial relationships, while of significance with respect to the organization and growth of the communications industry, simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago . . . (39 L.Ed.2d at 430).

The foregoing provides a complete answer to Petitioner's "quantitative" argument. And, even if legislative history and past practice did not so clearly indicate that that library photocopying was outside the copyright monopoly, the "functional" analysis suggested by this Court in *Fortnightly* compels that conclusion.

In the CATV cases, the function of the broadcasters was described as the selection, procurement, and editing of program material, and the dissemination of this material to the public. The role of the CATV companies was described as enhancing

the viewer's capacity to receive the broadcaster's signals through a separate and distinct dissemination medium.

Similarly, publishers select, procure, and edit the articles to be included within their journals. They then market their journals through established channels (subscriptions), knowing in advance who their buyers are, and producing multiple copies in anticipation of demand. Thus, publishers in the total publication and dissemination system are "functionally" like broadcasters in the CATV cases.

Libraries, in photocopying, on the other hand, function much as do the CATV operators. Libraries do not select or procure, other than as incident to normal collection activities—and they do not edit. They merely provide scientists, researchers, and scholars with access to journal articles in the traditional manner in which access has been effected. They supply *single* photocopies, and then only on request and not in inventoried anticipation of a marketplace demand. In the same sense that CATV operators' business is functionally distinct from that of broadcasters, so is the photocopying "business" of libraries separate and distinct from that of journal publishers.

To carry the analogy one step further, in the CATV cases this Court drew a line between broadcasters and viewers, and held that CATV operators fell on the "viewer" side of the line. In this regard, this Court in *Fortnightly* stated:

> It is true that a CATV system plays an "active" role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the *basic function* the equipment serves is little different from that served by the equipment generally furnished by a television viewer. If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be "performing" the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and

> owned not by its users but by an entrepreneuer. (397 U.S. at 399-400; emphasis supplied, footnotes omitted.)

Under the same analysis, libraries must be found to be on the "reader" rather than the "publisher" side of the line. It is tacitly admitted by Petitioner that the preparation by a scientist, researcher, or scholar of a copy of journal article for his own use has never been considered to be an infringement under Section 1(a) of the Act, even if the copy were made on a reprographic device rather than by hand. If several scientists purchased a "Xerox" machine for this same purpose, the same conclusion would clearly obtain. The only difference when libraries make the photocopies for them is that the reprographic device is owned by (or leased by) the library. But this arrangement is solely for the convenience of the library's patrons and should not transform a practice always considered to be outside the copyright monopoly into infringement, in spite of any resulting quantitative differential in the number of photocopies. The library is merely performing the time honored function of serving its readers and must be found to fall on the "reader" side of the line.

Ultimately, what was held in both *Fortnightly* and *Teleprompter* was that, if a new, separate, and distinct dissemination medium was to be brought within the copyright monopoly or some alternative accommodation of the interests of broadcasters was to be made, those were jobs for Congress and not this Court. The case for judicial abstention in the face of a plea for extension of the copyright monopoly is even stronger here. The challenged practice—library photocopying—is not one which has been recently engendered by technological innovation. It is a practice which was known to the drafters of the Copyright Act, has been in existence for many decades, and has never been thought to be within the copyright monopoly. A reversal of the decision by the Court of Claims will not simply be a construction of the Copyright Act to prohibit its "evasion because of changing habits due to new inventions and dis-

coveries", as argued by Petitioner (Pet. Br. at 48). It will represent a turning back of the clock almost sixty years to bring within the monopoly a practice not intended to be, and never thought to be, within its ambit.

POINT II

THE DOCTRINE OF FAIR USE PROVIDES A COMPLETE DEFENSE FOR TRADITIONAL LIBRARY PHOTOCOPYING

II. A. Introduction

Even assuming, *arguendo*, that preparation by libraries of single photocopies of articles, or parts of articles, from periodicals is within the ambit of the limited monopoly confered on authors by the Copyright Act of 1909, that traditional practice nevertheless is immunized under the doctrine of fair use. It was this doctrine that the majority of the Court of Claims expressly relied upon in ruling against the claims of Petitioner.

Petitioner, in arguing that library photocopying is a *per se* violation of the Copyright Act to which the fair use defense is inapplicable, attempts to focus merely upon the libraries' role in this activity, attempting to cast them in the light of publishers competing with it. Totally ignored in this simplistic and tortured approach are the interests of those whom the libraries serve, and the fact that those interests have been served for many decades by the very practices challenged. To put the "fair use" question into proper focus—a focus which truly comports with the genesis of library photocopying and explains why it has for so long gone unchallenged—the question must be broken down into two sub-questions:

> *Question 1*: Is it fair use for a scientist, researcher, or scholar to make a single photocopy of an article in a copyrighted journal for use in research or study?
>
> *Question 2*: Assuming the answer to Question 1 is in the affirmative, is the fair use privilege of the scientist,

researcher, or scholar destroyed if the library, acting as his agent, makes the photocopy for him at his request?

Question 1 is the primary issue before this Court in its consideration of the applicability of the fair use defense, and it demands an affirmative answer. The issue posed by *Question 1* is one of first impression, in the sense that no Court has ever been requested to pass upon it previously, although scientists, researchers, and scholars have been making, or obtaining from libraries, single photocopies for many decades.

Once *Question 1* is answered in the affirmative, *Question 2* can be placed in its proper context. Should this Court accept Petitioner's distorted picture of libraries as publishers competing with it and ignore the fair use defense available to their patrons, the incongruous result will be a library being held liable for acts on behalf of persons who have, and always have had, the right to perform those same acts, with the consequent destruction of the fair use defense.

II. B. Fair Use Permits Scientists, Researchers, and Scholars to Make Single Photocopies of Articles in Copyrighted Journals for Use in Research and Study

II. B. 1. Facts

Most, if not all, of the facts which are necessary to a determination of *Question 1* are not in dispute, and will be marshalled and briefly summarized below:

1. Photocopying by scientists, researchers, and scholars is mainly from non-profit journals published by scientific and professional societies.[15]

15. G. Sophar and L. Heilprin, *The Determination of Legal Facts and Economic Guideposts with Respect to the Dissemination of Scientific and Educational Information as it is Affected by Copyright—A Status Report, Final Report,* Prepared by the Committee to Investigate Copyright Problems Affecting Communication in Science and Education, Inc., for the U.S. Department of Health, Education and Welfare, Project No. 70793 (1967) (hereinafter "Sophar and Heilprin Report").

2. There are an overwhelming number of journals published by a multitude of publishers containing articles of interest to scientists, researchers, and scholars.
   a. The NIH Library houses about 150,000 volumes, of which about 30,000 are books and the balance scientific (principally medical) journals. (487 F. 2d at 1347.)
   b. In the biomedical field alone it is estimated that there are in excess of 10,000 journals published. (T. 275.)[16]
   c. It has been estimated that about 1,000 or more publishers originate the bulk of the materials photocopied by scientists, researchers, and scholars. (Sophar and Heilprin Report at 58-60.)
3. In accordance with library policy, library patrons request and are given only one photocopy of a particular article, and never a copy of a whole journal or book. (487 F.2d at 1348.) Petitioner notes (Pet. Br. at 9) that the NIH Library and NLM have policies which limit the nature and extent of their photocopying and allow only a single copy per patron and (Pet. Br. at 10) that "monographs" unlike journal articles, are never photocopied at NIH without permission of the copyright proprietor.
4. Photocopies obtained from libraries are generally used for purposes of research and study. (T. 189-90; 487 F. 2d at 1348.) Petitioner admits (Pet. Br. at 8) that its journal articles are generally photocopied by NIH and NLM for users engaged in medical or scientific research or treatment and that these scientists use such copies in their work. There is absolutely no evidence that any scientists, researchers, or scholars who obtain photocopies from libraries have ever republished the articles or competed in any manner whatsoever with the publisher thereof. (487 F.2d at 1354.) In fact, the majority below found that "On both sides—library and requester—scientific progress, untainted by any

16. As used herein "T" will refer to the trial transcript and the numerals appearing thereafter will denote particular pages thereof.

commercial gain . . . is the hallmark of the whole enterprise of duplication." (487 F.2d at 1354.)

5. Absent photocopying, scientists, researchers, and scholars would be denied access to much of the work published in their fields.

   a. The majority below stated that there is "no doubt . . . that medical science would be seriously hurt if . . . library photocopying were stopped." (487 F.2d at 1356.)

   b. The majority below further found that scientists' demands cannot be met by reprints (487 F.2d at 1356), and that it is unrealistic to expect libraries to purchase untold additional copies or to expect researchers to subscribe to numerous journals. (487 F.2d at 1357.)

   c. A study conducted for the Senate Subcommittee concerned with the revision of the Copyright law reported:

      The various methods of photocopying have become indispensable to persons engaged in research and scholarship, and to libraries that provide research material in their collections to such persons. Effective research requires that the researchers be informed of the findings and opinions of others and have an opportunity to study the materials written by them. These materials are often very extensive and appear in a large number of publications. *It is here that the libraries provide an indispensable service to research by furnishing the individual researcher with the materials needed by him for reference and study.*

      The need of researchers for ready access to a mass of materials is present in every field of scholarly investigation, but the problem is exemplified most clearly in the field of scientific and technical research. *The body of scientific and technical literature has grown so rapidly during the last few decades that it would be extremely difficult for the individual scholar or researcher to gain access to the works he may need to consult unless he can obtain copies*

from a library. This is true especially of periodical literature.

It would be virtually impossible for a person engaged in research to subscribe to all the periodicals which from time to time may touch upon his field of interest, and even the libraries where he lives may be unable to furnish the necessary material. Nor can libraries be expected to meet the needs of any number of researchers by loan of the copies in their collections. In response to the needs of researchers, most major libraries are equipped to provide them with photocopies of materials in the library's collections. *It is invaluable to a researcher to be able to obtain from a central or specialized library photocopies of the various articles he needs for reference and study.* Varner, "Photoduplication of Copyrighted Material by Libraries", Copyright Law Revision Study No. 15, Senate Subcommittee on Patents, Trademarks and Copyrights, 86th Cong., 1st Session. (Emphasis added.)

d. The testimony at trial confirmed the essentiality of photocopies to access:

Q. Am I to understand, then, that the reason for which photocopies were substituted for lending the original journal was to improve the scientist's accessibility to the published scientific record?

A. Yes, I might add, there are two aspects of the word "access" as I would use it there . . .—one is the question of physical accessibility: that is, to produce physical proximity, to place it immediately at an individual's disposal; and the other function that Xerography or photo-duplication does perform is breaking up the scientific record into units and permitting the free assemblage of those units into packages which particularly—relate specifically to the scientist's own complex interests. (T. 824-5.)

e. The testimony at trial also indicated that a scientist, researcher, or scholar could not afford to subscribe

to specific journals which would only occasionally contain articles relating to his field because:

> [O]verall, there are an insufficient number of articles in that specific journal that are of specific interest or use to me . . . (T. 574-5).

f. Copies of many journal issues are available only from libraries, and access to articles therein is available only by means of photocopies. The testimony at trial further shows the problems which inhere in attempting to obtain reprints from authors. One doctor testified that in less than one-third of the cases of requests for reprints was he successful in obtaining same, and that the fraction was even smaller for articles appearing in older journals. (T. 559.) His testimony was confirmed by that of a research technician employed by the National Institute of Health, who stated that from past experience his department did not even attempt to order reprints of articles from journals over three years old, since almost without exception such orders were not filled. (T. 527.)[17]

6. Scientists, researchers, and scholars have been obtaining photocopies of journal articles for at least fifty years, and the practice was well established as far back as 1935. (T. 430-1; Defendant's Exhibit 74.) Indeed, library photocopying appears to date back to the beginning of this century. (487 F.2d at 1355.)

7. There is absolutely no evidence that any publishers suffer a loss in subscription, back volume, or reprint revenue by reason of the obtaining by scientists, researchers, or scholars from libraries of single photocopies of articles appearing in the publishers' journals. (487 F.2d at 1357-58.)

The foregoing facts provide a clear basis for a successful fair use defense on behalf of the scientists, researchers, and scholars

17. Plaintiffs Exhibit 2 contains a notice to the effect that the publisher does not attempt to keep a stock of back issues and cannot guarantee to supply back issues of belated renewals, and that issues of even the current volume "may be out of print at the time the subscription order is received".

who obtain single photocopies of journal articles for practical application in their fields.

II. B. 2. The Law of Fair Use Applied to the Facts

Before applying the doctrine of fair use to the facts set forth above, it is well to have the definition of, and basis for, the doctrine firmly in mind. The Copyright Clause of the Constitution authorizes Congress:

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings. (U.S. Const.Art.1, § 8).

Even before the creation of our own copyright system, the Courts of England recognized the potential conflicts inherent in a system designed to promote the dissemination of information by granting monopolies in the manner of its expression. In the case of *Sayre* v. *Moore*, 102 Eng.Rep. 139 (K.B. 1785), Lord Mansfield stated:

> We must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits and the reward of their ingenuity and labor; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded. (102 Eng.Rep. at 140)

The judicial doctrine of fair use has been fashioned by the Courts in this country to guard against this latter evil.

A succinct definition of the doctrine is found in the case of *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), wherein the Court remarked:

> "Fair use" is a "privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner * * *" Ball, Copyright and Literary Property 260 (1944). See generally Latman, Fair Use of Copyrighted Works, Study No. 14, prepared for the Sub-

committee on Patents, Trademarks and Copyrights, Senate Comm. on the Judiciary, 86th Cong., 2d Sess. (Comm. Print 1960). The fundamental justification for the privilege lies in the constitutional purpose in granting copyright protection in the first instance, to-wit, "To Promote the Progress of Science and the Useful Arts." U.S. Const.Art.1, § 8. See Mathews Conveyor Co. v. Palmer-Bee Co., 135 F. 2d 73 (6th Cir. 1943); Note, 56 Colum. L.Rev. 585, 595 (1956). To serve that purpose, "courts in passing upon particular claims of infringement must occasionally subordinate the copyright holders' interest in a maximum financial return to the greater public interest in the development of art, science and industry." Berlin v. E.C. Publications Inc., 329 F.2d 541, 544 (2d Cir. 1964). Whether the privilege may justifiably be applied to particular materials turns initially on the nature of the materials, e.g., whether their distribution would serve the public interest in the free dissemination of information and whether their preparation requires some use of prior materials dealing with the same subject matter. Consequently, the privilege has been applied to works in the fields of science, law, medicine, history, and biography. See Latman, supra at 10. (306 F.2d at 306-7.)

It is readily apparent that the question presently under discussion poses exactly the issues referred to above, namely, should the interests of publishers in profit maximization be subordinated to the interests of scientists, researchers, and scholars in furthering art, science, and industry so as to permit the latter to obtain single photocopies of articles in copyrighted journals without the consent of the publisher and notwithstanding the copyright claimed by him, as has been the practice for decades.

The criteria traditionally used to evaluate the question of fair use are well recognized:

a. the purpose of the use;
b. the nature of the copyrighted work;
c. the amount or substantiality of the material used in relation to the copyrighted work as a whole; and
d. the effect of the use on a copyright owner's potential market for his work.

However, the instant case—in presenting a question of first impression—differs from those in which the criteria have heretofore been applied. The distinction is important in view of Petitioner's specious argument that, because entire articles are photocopied, there is a *per se* violation of criterion "c" above and that therefore the other criteria need not even be evaluated. (Pet. Br. at 22 *et seq.*)

The distinction can best be pointed out by reference to the context in which the term "use" appears in criteria "a", "c", and "d" above. What is clearly contemplated is the situation in which the fair use issue commonly arises—portions of a copyrighted work being lifted *and incorporated into another work* which competes to a certain degree with the original. Scientists, researchers, and scholars in contrast, obtain single photocopies of journal articles for purposes of research and study, and *not for publication in other works.* (T. 189-90; 487 F.2d at 1354.) They are not authors seeking to misappropriate the work of earlier authors to their own profit-seeking ends.

Examining the distinction from another standpoint, the doctrine of fair use *presumes access* to earlier works by others planning to write in the same field. It provides a means whereby the earlier works can be used as building blocks to promote science and the useful arts. On the other hand, its concern is that the house that is constructed is not built solely or in too large measure of borrowed bricks. In the case of library photocopying, the activity being challenged *is the obtaining of the normally presumed access.* The "use" made of the works is not of the type with which the doctrine of fair use is usually concerned—no new house is constructed. The bricks thus obtained are, however, used in a manner consistent with the intent of the doctrine. They add to the knowledge of those practicing in the areas of science and the useful arts, and thereby promote progress therein in a most *direct* and *practical* way. Thus, a far stronger case can be made that library photocopying, as traditionally and currently practiced, is *per se* fair use, rather than *per se* unfair use.

The foregoing distinction between use in *other works* versus use in the sense of *access* and *practical application* is clearly recognized in the landmark of *Baker* v. *Selden,* 101 U.S. 99 (1879), wherein this Court stated:

> The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book. And where the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book . . . such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public; not given for the purpose of publication in other works explanatory of the art, but for the purpose of practical application.
>
> * * * * *
>
> On the other hand, the teachings of science and the rules and methods of useful art have their final end in application and use; and this application and use are what the public derive from the publication of a book which teaches them . . . The use of the art is a totally different thing from a publication of a book explaining it. (101 U.S. at 103-4.)

The distinction was also recognized by the majority of the Court of Claims, when it stated:

> There has been no attempt to misappropriate the work of earlier scientific writings for forbidden ends, but rather an effort to gain *access* to the material for study and research. (487 F.2d at 1354, emphasis added.)

The foregoing distinction provides a complete answer to Petitioner's *per se* argument. Moreover, it serves as a framework against which the fair use criteria, *in their relation to this case of first impression,* can be applied.

II. B. 2. a. Purpose of the "Use"

It has been pointed out above that the use made of photocopies by scientists, researchers, and scholars is of the "access-practical application" type, as opposed to the "competing work" type. The practical application thereof is, of course, in the area of science and the useful arts.

As to this area, the fair use doctrine as it relates to "competing work uses" is given its broadest interpretation. As stated in *Loew's Inc.* v. *Columbia Broadcasting System, Inc.* 131 F.Supp. 165 (S.D.Cal. 1955); aff'd. 239 F.2d 532 (9th Cir. 1956); aff'd, 356 U.S. 43 (1958):

> Thus, in the field of science and the fine arts, we find a broad scope given to fair use. "This doctrine permits a writer of scientific, legal, medical and similar books or articles of learning to use even the identical words of earlier books or writings dealing with the same subject matter." . . . The writer of such works "invites reviews, comments and criticism" and we would add, the "use" of the books and portions and quotations therefrom for the purpose of the advancement of learning.
>
> . . . [T]he law permits those working in a field of science or art to make use of ideas, opinions, or theories, and in certain cases even the exact words contained in a copyrighted book in that field [citing cases] This is permitted in order, in the language of Lord Mansfield in Sayre v. Moore, 1 East 361, 102 Eng. Reprint 139 "that the world may not be deprived of improvements, nor the progress of the arts be retarded." In such cases the law implies the consent of the copyright owner to a fair use of his publication for the advancement of the science or art. (131 F.Supp. at 175.)

See also, *Baker* v. *Selden* and *Rosemont Enterprises, Inc.* v. *Random House, Inc., supra.*

It is well recognized, then, that a scientist, researcher, or scholar can *borrow* even the exact words from an earlier copy-

righted work and use them in a new work for the advancement of learning without infringing the copyright:

> The latitude which is permitted a second author within the pale of "fair use" was stated in Sampson & Murdock Co. v. Seaver-Radford Co., 1 Cir. 1905, 140 F. 539, as follows:
>
> > . . . so, also, it is clear that, under some circumstances and for certain purposes, a subsequent publisher may draw from the earlier publication its identical words, and make use of them. *This is peculiarly so with reference to works in regard to the arts and sciences, using those words in the broadest sense*, because, within reference to them, any publication is given out as a development in the way of progress, and, to a certain extent, by common consent, including the implied consent of the first publisher, others interested in advancing the same art or science may commence where the prior author stopped. This includes medical and legal publications, in which the entire community has an interest, and which the authors are supposed to give forth, not only for their own pecuniary profit, but for the advancement of science. *Greenbie* v. *Noble*, 151 F.Supp. 45, 67-8 (S.D.N.Y. 1957; emphasis added).

and,

> Succinctly stated, this doctrine [fair use] permits a writer of scientific, legal, medical and similar books or articles of learning to use even the indentical words of earlier books or writings dealing with the same subject matter. *Thompson* v. *Gernsback*, 94 F.Supp. 453, 454 (S.D.N.Y. 1950).

It is clear, therefore, that a scientist, researcher, or scholar can borrow the exact words from a copyrighted journal article and use them in the publication of a new article dealing with the same subject and competing with the original without incurring liability for copyright infringement.[18] It would be totally

18. To the extent, if any, that some few library patrons depart from the norm in their use of photocopies, and further distribute copies thereof or use their contents in competing works, the copyright proprietors have their rights against "unfair users" and those rights are not insubstantial. If infringement is established, the copy-

anomalous if, when he merely obtained access to these same words in the form of a photocopy, and did nothing with them except refer to them in his research and study, he would be guilty of copyright infringement.[19] The law of copyright does not, and this Court should not, permit a cloak of formalism to mask such a potentially ludicrous state of affairs. At least the same latitude accorded to "competing work users" should be given to "practical application users" seeking access to earlier works by means of photocopies.

II. B. 2. b. Nature of the Copyrighted Works

Photocopying for scientists, researchers, and scholars is mainly from non-profit journals published by scientific and professional societies (Fact 1, p. 28). Authors who contribute articles to such journals typically receive no compensation from the publisher and are interested only in the widest possible dissemination of the results of their research. (T. 669-70.)[20]

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right owner is entitled to: (1) any profits made by the infringer by reason of this infringement under 17 U.S.C. § 101; (2) damages which are set at a statutory minimum of $250 under 17 U.S.C. § 101; and (3) costs and attorneys' fees under 17 U.S.C. § 116. Thus, the copyright owner has effective ways to protect against even minimal infringements, short of mislabelling *every* scientist, reasearcher, and scholar as infringers and burdening libraries with the task of exacting unwarranted tribute from them.

19. As the Court remarked in *Rosemont, supra:*

> We, however, cannot subscribe to the view that an author is absolutely precluded from saving time and effort by referring to and relying upon prior published material. Cf. *Oxford Book Co.* v. *College Entrance Book Co.*, 98 F.2d 688 (2d Cir. 1938). It is just such wasted effort that the proscription against the copyright of ideas and facts, and to a lesser extent the privilege of fair use, are designed to prevent. (366 F.2d at 310.)

20. Only in rare and exceptional cases will even a portion of a monograph be photocopied. (T. 600-604; 844-50; 1329.) The reason for this was explained at trial by the ex-Deputy Director of the National Library of Medicine as follows:

> Now, it is also the rule that an individual scientist contributes a paper without charge. There is no formal contractual relationship between either the society at whose meeting he presents

And, of course, it is precisely when the copyrighted work is of the foregoing nature—relating to science and the useful arts —that the doctrine of fair use is given its broadest definition. *Rosemont, Baker,* and *Loew's, supra.* Thus the application of the second criterion to the facts of the present situation also clearly supports a finding of fair use.

II. B. 2. c. The Amount and Substantiality of the Material Used in Relation to the Whole

It is on this criterion that Petitioner bottoms its *per se* argument. According to Petitioner, each article appearing in a journal is a separate work, and thus, when scientists, researchers, and scholars obtain copies of such articles, they "use" the whole work. Petitioner argues, in essence, that regardless of the other three criteria, this practice cannot possibly be fair use. (Pet. Br. at 22 *et seq.*)

The foregoing argument is without merit for two reasons. First, it is based on a misconception of the basis for the fair use defense. Second, since what is at issue herein is not "use in a competing work" but rather "access-practical application" type

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this paper or the publisher and the individual scientist-author. It is "contributed", a contributed paper. He received no pecuniary reward at all for having contributed—usually; I am speaking in generalizations; this is the usual practice in the sciences—having contributed that paper.

This, therefore, is one economic system. Simultaneously the same scientist lives in another economic system, that of the publication of monographs or textbooks. These—it is the exception where a monograph is contributed. Almost universally it is the subject of a contractual relation between a publisher—and usually a commercial publisher—and the individual author, in which there is a pecuniary award to the author of the monograph.

All that I'm saying, and I'm making a—I'm not trying to get into this in great depth, but all I'm saying is that the whole business of pecuniary award to the creator, and the question of property, is more cogent, is more pertinent, in the field of monographic publishing than it is in the field of scientific journal publishing. (T. 847-49.)

use, the fair use criteria relating to the ratio between the amount borowed and the whole work is only applicable to the former, common type of use not to the latter.

Contrary to Petitioner's position, the doctrine of fair use is not based upon the principle of *de minimis* copying. That is, if more than a *de minimis* amount of a copyrighted work is used (in either sense of the word "used"), this alone does not create *per se* copyright liability. The true relationship between *de minimis* and fair use is described in Cohen, *Fair Use in the Law of Copyright*, ASCAP, COPYRIGHT LAW SYMPOSIUM (No. 6, 1955), at 44, 47, as follows (footnotes omitted):

> It is only when the preliminary questions: is the material copyrightable? was it copyrighted? was it copied? and was enough copied to satisfy the "substantial appropriation" doctrine and to make the *de minimis* doctrine inapplicable? have been answered in the affirmative, that the question of whether there has been a fair use arises . . .

Nimmer on Copyright also acknowledges that the fair use defense is not grounded on the *de minimis* standard:

> . . . It is certainly possible, as do the foregoing definitions in whole or in part, to employ the term fair use as a label for similarity which is not substantial. It is possible, but not very helpful since this approach merely restates the problem of determining substantial similarity, and ignores what may be regarded as the crucial problem of fair use. *That problem arises where it is established by admission or by the preponderance of the evidence that the defendant has copied sufficiently from the plaintiff so as to cross the line of substantial similarity.* The result must necessarily constitute an infringement unless the defendant is rendered immune from liability because the particular use which he made of plaintiff's material is a "fair use". In this more meaningful sense fair use is a defense not because of the absence of substantial similarity but rather despite the fact that the similarity is substantial. (*Nimmer on Copyright*, 1971 ed., pp. 644-5; emphasis added.)

Of course, the foregoing comments relate to the situation where the copied material is used in a new work. If the *de minimis* standard is not applicable to that situation, it is *a fortiori* inapplicable to the *access-practical application* type of use presented herein.

Moreover, in view of this "type of use" distinction, it appears that the criteria relating to the ratio of the amount copied/copyrighted work as a whole is not even applicable to the instant case. The majority of the Court of Claims suggested the inapplicability of this criteria in several ways. First, it listed a number of common, every-day situations where single photocopies of, by Petitioner's definition, whole copyrighted works are obtained for access-practical application purposes, none of which have been challenged as being copyright infringements. Among these are:

1. A lawyer or a Judge obtaining photocopies of recent decisions from copyrighted reports for practical use in connection with litigation; (487 F.2d at 1353.)
2. One Judge making and giving to another a photocopy of a law review article from a copyrighted journal which bears upon a problem they are considering. (487 F.2d at 1353.)

Based on the foregoing situations, to which this Court will relate equally well, the majority below was compelled to conclude in the case before it that:

> There is, in short, no inflexible rule excluding an entire copyrighted work from the area of "fair use". Instead, the extent of copying is one important factor, but only one, to be taken into account, along with several others. (487 F.2d at 1353.)

In arguing against the foregoing position and in favor of its *per se* approach, Petitioner relies upon cases in which copyrighted material was used in *new works*. For example, Petitioner argues at page 24 of its Brief that:

> *Wihtol* and *Benny*, particularly, involved *creative additions* to earlier copyright works.
>
> * * * * *
>
> The court [in *Rosemont*] analyzed the fair use doctrine in terms of [new] *material* which in its "preparation requires some use of prior materials dealing with the same subject matter." (Pet. Br. at 24; emphasis added.)

The instant case does not involve "creative additions" or "new material". Therefore, the cases upon which Petitioner relies are inapposite.

The scientists, researchers, and scholars who obtain single photocopies of a journal article use them for research and study. They do not republish[21] the articles, nor do they incorporate them into new articles. The reply to the question "how much is photocopied?" is "one copy of one article"[22] and that answer

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21. As reported in *National Institute, Inc.* v. *Nutt*, 28 F.2d 132, 134 (D. Conn. 1928), the case of *Nicols* v. *Pitman*, 26 L.R. Ch. Div. 374, recognized the clear distinction between use and republication. In that case the defendant took shorthand notes of a copyrighted lecture and republished the notes as an article in a periodical. The Court held that the audience at the lecture *were at liberty to take the fullest notes for their own personal use*, but not to use them afterwards for the purpose of publishing the lecture for profit.

22. The Copyright Act itself recognizes both *single copies and private use* as exceptions to the limited monopoly which it grants. 17 U.S.C. § 107 states in relevant part:

> . . . During the existence of the American copyright in any book the importation into the United States of any piratical copies thereof or of any copies thereof . . . which have not been produced in accordance with the manufacturing provisions specified in Section 16 of this title . . . is prohibited: *provided, however,* That except as regards piratical copies, such prohibition shall not apply:
>
> * * * * *
>
> (d) To any book published abroad with the authorization of the author or copyright proprietor when imported under the circumstances stated in one of the four subdivisions following, that is to say:
>
> First. When imported, *not more than one copy at one time, for individual use and not for sale;* but such privilege of importation shall not extend to a foreign reprint of a

certainly does not foreclose, *per se*, the defense of fair use on behalf of scientists, researchers, and scholars seeking access to such articles for purposes of practical application.

II. B. 2. d. The Effect of the Use on a Copyright Owner's Potential Market for His Work

In view of the foregoing discussion, this fourth fair use criterion, in the context of this case, is more properly phrased as "The Effect of Scientists, Researchers, and Scholars Obtaining Access to Journal Articles Through Single Photocopies For Purposes of Practical Application On the Market For the Whole Journals". Petitioner candidly speaks (see Pet. Br. at 7) to this issue as follows:

> The effect of unauthorized photocopying cannot be measured exactly in dollars and cents. [omitting transcript reference.] In fact, it is not even clear that anybody could determine whether any particular instances of photocopying would or would not result in the loss of a particular form of revenue by a publisher, such as petitioner. [omitting transcript reference.]

In view of the foregoing admission, it is hardly surprising that the majority of the Court of Claims found that:

> This record simply does not show a serious adverse impact, either on plaintiff or on medical publishers generally,

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book by an American author copyrighted in the United States.

* * * * *

Third. When imported, *for use and not for sale, not more than one copy of any such book* in any one invoice, in good faith *by or for any society or institution incorporated for educational literary, philosophical, scientific or religious purposes, or for the encouragement of the fine arts,* or for any college, academy, school, or seminary of learning, *or for any State, school, college, university, or free public library in the United States.*

Fourth. *When such books form parts of libraries or collections purchased en bloc for the use of societies, institutions* or libraries designate in the foregoing paragraph . . . and are not intended for sale . . . (emphasis added).

> from the photocopying practices of the type of NIH and NLM. In the face of this record, we cannot mechanically assume such an effect, or hold that the amount of photoduplication proved here "must" lead to financial or economic harm. This is a matter of proof and plaintiff has not transformed its hypothetical assumption, by evidence, into a proven fact. (497 F.2d at 1359.)

Perhaps it is due to the weakness of Petitioner's case on this fourth criterion that it contends so strongly for a *per se* approach under the third criterion. It also explains why the Petitioner, in a Procrustean effort, would have this Court read the decision below as requiring it to prove actual damages. However, what the majority of the Court of Claims was doing was merely attempting to assess the effect of photocopying on petitioner's market for its journal subscription, and it found no evidence that the practice had any adverse effect at all.

The reason who no such effect was found should be clear. In the words of one of Petitioner's amici—The Authors League of America:

> This systematic reproduction of articles on demand is a *separate medium* for distributing them; as distinct from the distribution of the original journals as the distribution of mass-market paperback reprint editions is from the sale of the original higher-priced hardcover editions of the same books. (Brief of Authors League of America, *amicus curia* at 7.)

ALA agrees that traditional library photocopying is a separate medium for distribution of journal articles. The medium has been in existence for many decades, and it is the only medium whereby the majority of scholars, researchers, and scientists can obtain access to the articles for purposes of practical application.

Whereas, perhaps in the hardback-paperback situation the effect of one medium upon the other is apparent, there is absolutely no evidence of such an effect in this case. The only relevant testimony shows that photocopies do not supplant originals. An individual can only subscribe to so many expensive journals,

and in many instances a given journal will contain an insufficient number of articles of interest to him to warrant his subscription. (T. 574-5; 487 F.2d at 1357.) Thus, photocopies do not supplant, they supplement, and it does not follow that one who photocopies would otherwise be a subscriber.[23]

Petitioner is thus left with merely the argument, or rather the tautology, that if it received compensation in respect of library photocopying it would be in healthier financial condition. The majority of the Court of Claims made short work of this argument, as follows:

> It is wrong to measure the detriment to plaintiff by loss of presumed royalty income—a standard which necessarily assumes that plaintiff had a right to issue licenses. That would be true, of course, only if it were first decided that the defendant's practices did not constitute "fair use." In determining whether the company has been sufficiently hurt to cause these practices to become unfair, one cannot assume at the start the merit of plaintiff's position, i.e., that plaintiff had the right to license. That conclusion results

23. On the facts of the present case it can be clearly demonstrated that photocopying does not supplant journal subscriptions. From the table at page 36 of the Commissioner's Report, it can be seen that during the 108 day period between September 27, 1967 to Jan. 12, 1968, a total of thirteen copies were made of the eight articles in suit by the two library defendants. The eight articles which were copied appeared in five journal volumes published by plaintiff. Extrapolating these figures, approximately forty photocopies of the article in question would be made yearly, and adding a margin of 25%, this figure would be fifty. If it is assumed for convenience that the fifty copies are divided equally among the five journal volumes, in one year a total of ten copies of articles appearing in any one volume would be made by the two library defendants. In this regard it should be noted that it is *volumes*, not articles, to which plaintiff seeks subscriptions. Further conservatively assuming that the two libraries serve 4000 scientists (this is estimated to be the size of the NLM professional staff, although the NLM serves the whole country), it is seen that the chances of a given scientist photocopying a portion of a given journal in any one year are about 1/400. Can it seriously be contended that given these odds the scientist would subscribe to the expensive journal if photocopies were not available? If he did, it would be on the expectation that in 400 years he would find one article which was useful to him. The question therefore answers itself. Photocopying does not supplant journal subscription.

only if it is first determined that the photocopying is "unfair." (487 F.2d at 1357, n. 19.)

The foregoing point can be emphasized by analogy to the *Fortnightly* and *Teleprompter* CATV cases, *supra.* In those cases, the copyright owners could not prove economic harm through the activities of CATV. CATV merely made the copyrighted programs available to those who could not otherwise view them. The copyright owner's argument was that they should nevertheless be compensated for this use, in a related but separate medium, of the copyrighted programs. The argument must fail here as it did there.

Even if it were assumed, *arguendo,* that the use of photocopies by scientists, researchers, and scholars resulted to a limited extent in a minor loss of potential sales of original journals, this would not be fatal to the defense of fair use. Publishers can claim no inherent or natural rights in the writings of authors. *Fox Film Corp.* v. *Doyal,* 286 U.S. 123, 127 (1932). The Copyright Laws are not intended to codify any moral principle holding the financial interests of publishers inviolate. The end sought by the Copyright Laws is to promote the public interest. Financial incentives are offered only as a means to this end.

The Congressional Report which accompanied the present Copyright Act recognized this objective:

> The enactment of *copyright legislation* by Congress under the terms of the Constitution *is not based on any natural right that the author has in his writings,* for the Supreme Court has held that such rights as he has are *purely statutory rights, but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive right to their writings.* The Constitution does not establish copyright, but provides that Congress shall have the power to grant such rights if it thinks best. *Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of*

> *the great body of the people, in that it will stimulate writing and invention, to give some bonus to authors and inventors.* (House Report No. 2222, 60th Cong., 2d Sess., at 6-7; emphasis added.)

And in the case of *Berlin* v. *E. C. Publication, Inc.*, 329 F. 2d 541 (2d Cir. 1964), the Second Circuit expressed the same views, i.e., that profit maximization must give way to the public interest in regard to the Copyright Laws, as follows:

> While indeed broad, the areas in which a copyright proprietor is permitted the exclusive commercial benefits of his copyright work is clearly not without limit. In the words of Article I, Section 8, of the Constitution, copyright protection is designed "To promote the Progress of Science and useful Arts," *and the financial reward guaranteed to the copyright holder is but an incident of this general objective, rather than an end in itself. As a result, courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry.* (329 F.2d at 543-44; emphasis added.)

It is thus manifest that copyright infringement is not established simply upon a showing that the use of a copyrighted work complained of derogates from the copyright owner's goal of profit maximization. The present attack on library photocopying is based solely on a desire for profit maximization, and not upon any necessity to protect the health of the publishing industry. It is an attempt to obtain compensation in respect of a *separate medium* for the dissemination of knowledge for practical application, which has been maintained for many decades, is essential to permit access to such knowledge, and was never before thought to be within the copyright monopoly.

II. B. 2. e. Question 1 Should Be Answered in the Affirmative

It will be recalled that *Question* 1, of first impression in this Court, is:

> Is it fair use for a scientist, researcher, or scholar to make a single photocopy of an article in a copyrighted journal for use in research or study?

From the foregoing analysis of the criteria bearing on fair use in the present context, it will be seen that the "purpose of the use" and the "nature of the copyrighted work" clearly dictate an affirmative answer to this question. It was further demonstrated that the amount photocopied by an individual scientist, researcher, or scholar is not substantial, and that in any event the "how much" criteria is inapplicable to a case where there is only access to, and practical application of, the original material and no republication or incorporation in a competing work. Finally, the lack of evidence of photocopyings' having any adverse effect on the copyright owners' market for its journals was shown. The inference of any such effect, which is the only factor possible militating against a finding of fair use, is of scant importance. The copyright owner's attempt to obtain profit maximization is more than offset by the fact that to deny scientists, researchers, and scholars their traditional right to make single photocopies of journal articles is to deny them access to, and the ability to use, the recorded knowledge in their fields.

Clearly, an affirmative answer to *Question* 1 is warranted on the facts of this case.

II. C The Fair Use Privilege of the Scientist, Researcher, or Scholar Is Not Destroyed When the Library, Acting as His Agent, Makes a Single Photocopy for Him at His Request

From the foregoing discussion, it is clear that it is fair use for a scientist, researcher, or scholar to obtain access to journal articles in the form of single photocopies for purposes of practical

application of their teachings. The second question, it will be recalled, then becomes:

> Is the fair use privilege of the scientist, researcher or scholar destroyed if the library makes the photocopy for him at his request?

II. C. 1. Facts

As before, most of the facts relevant to a determination of Question 2 are not in dispute. These facts are set forth below for convenient reference.

1. "Usually, researchers request photocopies of articles to assist them in their on-going projects". (487 F.2d at 1348.)
2. "[Libraries, pursuant to the General Interlibrary Loan Code] will provide only one photocopy of a particular article, per request, and will not photocopy on any given request an entire journal issue". (487 F.2d at 1348.)
3. ". . . medicine and medical research will be injured by holding these particular [library] practices to be an infringement . . ." (487 F.2d at 1354).

The foregoing are the only facts necessary to require a negative answer to Question 2. Libraries merely act as agents for their patrons and do for them at their request what they themselves have always been privileged to do under the doctrine of fair use. Moreover, libraries exercise care so that they do not, themselves, overstep the bounds of the fair use privilege accorded to their patrons.[24] Thus, it would be anomalous if the library were

24. The Interlibrary Loan Code (See footnote 2, p. 3, *supra*), for example, establishes "responsibilities" for both Borrowing Libraries and Lending Libraries as well as "Conditions on Loans" which generally operate to limit photocopying to materials for use in research and which are not otherwise available to the requesting party. The Code further encourages the use of original works whenever practical and particularly when the amount of material requested is extensive. Thus, there is nothing connected with an interlibrary loan transaction which would bear upon the four criteria used to measure the applicability of the defense in particular circumstances.

held liable on a charge to which its patrons had a complete fair use defense.

II. C. 2. Question 2 Should Be Answered in the Negative

It is clearly apparent why the Petitioner seeks to impose copyright infringement liability upon libraries rather than attacking their readers directly. The reason is simply that almost all (and perhaps every one) of these readers are not infringers but rather are "fair users".

The purported basis for ignoring the fact that libraries are merely agents of readers is that under the Copyright Act, 17 U.S.C. § 1(a), unauthorized "copying" purportedly constitutes the literal standard of infringement. By having library employees operate reprographic machines on behalf of readers, so the argument goes, suddenly it is the libraries and not the readers who are doing the "copying". Somehow, when the *same* reader, for the *same* purposes, asks the library to photocopy the *same* portion of a work for him, instead of borrowing the work and thereupon making a photocopy himself, the reader's fair use is deemed irrelevant.

The illogic of this contention is manifest—the library acts only as the agent of the reader, and its actions do not destroy the fair use privilege that is available to the reader. The fact that the library may be referred to as the "copier" in the latter situation is a semantic nicety of no significance.

This wholly technical approach to library photocopying ignores the true functional relationships of the parties—copyright owners as disseminators of information and readers as users thereof, with libraries serving merely as intermediaries. In *Fortnightly* and *Teleprompter, supra,* this Court had occasion to interpret the literal language of the Copyright Act in light of present day realities. As already pointed out, the present situation is closely

Accordingly, if the requesting scholar is entitled to the fair use defense, that defense is not impaired by the library role of making the requested copy.

analogous to that before this Court in the *Fortnightly* case. The three parties whose interests were before the Court in these CATV cases—the copyright owners, the CATV operator, and the television viewers—were in similar positions to the Petitioner, the libraries,[25] and the readers herein.

The CATV operators there transmitted without license broadcasts of copyrighted materials to viewers who could not otherwise receive them. The question presented was whether this constituted "performance" of the copyrighted works so as to infringe under the literal language of the copyright law. This Court answered this question by rejecting the "quantitative" approach in favor of a functional analysis (392 U.S. at 396-401).

The CATV "middleman" was held not liable for copyright infringement because he did "no more than enhance the viewers' capacity to receive" television broadcasts. Similarly, the "middleman" in the present suit—the library—does no more by photocopying than enhance the researchers' and scholars' access to and use of printed materials, to which such readers have a right under the doctrine of fair use. Thus, both the CATV operator and the library are extensions or agents of the ultimate beneficiaries. A copyright owner could sue a customer of CATV if the customer were to perform the broadcast for profit (as by charging admission to a television reception of a concert of copyrighted music). Likewise, if a reader utilizes a photocopy obtained from a library for purposes outside the realm of fair use, the copyright owners' cause of action lies against the reader and not the intermediary library.

As a practical matter libraries are in no position to raise a fair use defense based on each particular reader's actual manner of utilizing the copied article. Thus, if it is decided that libraries are liable for copyright infringement in respect of photocopying,

25. A distinction that should be kept in mind is that the CATV operator was profiting from its activities, whereas libraries do not profit from photocopying.

they will be faced with the Hobson's choice of either collecting copyright royalties in respect of every page photocopied for every reader regardless of fair use or completely discontinuing the practice of photocopying.

The result of the first of these choices is obvious. It would deprive readers who would be fair users of an opportunity to raise the fair use defense in support of their right to free access to and practical application of works in the library's collection. The only advantage served would be to collect royalties from those very few readers (if any) who would use photocopies for infringing (i.e., non-fair use) purposes. Discontinuance of library photocopying would be even more disastrous to the interests of readers and would be of no benefit to the copyright owners. The results would be a significant lessening in the availability of works in libraries' collections, and a replacement of library photocopying with private copying or with coin-operated copying on the library premises by readers themselves.

If reader photocopying were to be the norm, the copyright owner would be thrown back upon his remedies as against the individual reader. Those readers making a "fair use" of their photocopies would have a defense to such an action, whereas the small number of readers violating the copyright law would be liable for infringement. Since this situation prevails currently, there is absolutely no justification whatsoever for forcing libraries to discontinue their photocopying practices, which are so essential to scientists, researchers and scholars, or for depriving such readers of their right to raise the defense of fair use.

It would perhaps be more convenient for the plaintiff herein to measure and collect royalties at the library level, but the monopoly of the copyright law cannot be enforced for mere convenience. The plaintiff has its rights against the ultimate users of photocopies of its materials, and those rights are not insubstantial.

Moreover, once it is concluded that libraries acting as agents for their patrons are entitled to assert the fair use defense for

single photocopies made available to researchers, scholars, and scientists, it makes no difference whether the requesting patron is present at the library in person or is making the request from some remote location either individually or through a satellite library pursuant to the ALA Interlibrary Loan Program, which is designed to make the country's combined library resources accessible on a nationwide basis. Again the author or publisher is left with his remedies as against those individual readers who misuse materials provided under the program.

The ALA Interlibrary Loan Program may be characterized as a "geographic extension of the library loan desk", which makes it possible for scholars, researchers, and scientists in even the most remote locations to obtain literature relating to their chosen fields of endeavor for practical application therein. Thus, originals and single photocopies of materials are disseminated through small local libraries to scholars unable to come in person to the nation's centers of knowledge.

In *Teleprompter*, this Court considered, in the context of CATV, the effects of geographically extending into remote areas locally permissible service. It was confronted with the contention that to "bring [TV] signals into a community that would not otherwise be receivable on an antenna, even a large community antenna, erected in the area" transformed the CATV systems from nonperformers into performers, thus making them liable for copyright infringement. This Court flatly rejected that approach, stating:

> The reception and rechanneling of these signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer. (39 L.Ed.2d at 426.)

Thus, a CATV system does not lose its status as a nonbroadcaster, and non-performer for copyright purposes, when the signals it carries are those from distant rather than local sources.

Similarly, the process by which one library answers the request of another library by supplying a photocopy pursuant to

interlibrary loan does not alter the balance of interests established herein in favor of fair use. That balance results from application of the four criteria established for fair use, not one of which is affected by the injection of the issue of "distance" into the library single photocopy dissemination practice.

Accordingly, it must be concluded that, if the local practice of supplying a single photocopy to a requesting scholar is fair use, then the Interlibrary Loan Program practice of supplying a single photocopy to a remotely located requesting scholar must also be fair use.

In sum, logic, policy, and precedent support a functional analysis of the parties' relationships in the library photocopying area. That analysis shows the copyright proprietor's position to be nothing more than a thinly veiled attack on the fair use defense enjoyed by scholars, researchers, and scientists for the benefit of the public. Functionally, libraries do nothing more than act as agents or instrumentalities of readers. Libraries should not face exposure to copyright infringement for doing merely what their readers ask them to do.

POINT III

PRACTICAL CONSIDERATIONS

The majority of the Court of Claims seemed well aware of the consequences of a decision for Petitioner. In fact, as will be pointed out below, it expressly considered some of the arguments made to it by the ALA in its *amicus* brief below as to the probable results of such a decision, which it described as follows:

> The result of a flat proscription on library photocopying would be, we feel sure, that medical and scientific personnel would simply do without, and have to do without, many of the articles they now desire, need, and use in their work.*

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*We think the alternative of compulsory licensing is not open to us under the present copyright statute. (487 F.2d at 1357 and n.18.)

The practical considerations which clearly indicate that a decision in favor of Petitioner will result in a "flat proscription on library photocopying" will be discussed below.

III. A. Holding Operation

The decision below takes cognizance of the fact that there are presently under consideration, and have been in the recent past, bills in Congress which would have an important bearing on library photocopying. And Petitioner points out that on July 3, 1974, the Senate Judiciary Committee reported out a Copyright Revision Bill—S. 1361 (amended), 93rd Cong., 2d Sess.—which specifically deals with library photocopying, and which would appear to sanction this practice as it is carried out currently by ALA's members.

ALA can offer no assurance to this Court that such legislation will be enacted within the next few months or as to the ultimate provisions thereof. However, Congress is obviously considering the matter. This is important to keep in mind when focusing upon the practical consequences of the decision in this case. To change the *status quo* and thereby put libraries at the mercy of the copyright proprietors in the interim before Congress acts can have only one salutary effect—when Congress is beseiged by pleas from scientists, researchers, and scholars that they cannot obtain access to the materials they need in their work, Congress may be prompted to move, but in the interim scholarship would be at the mercy of a monopolist's exclusionary potential. That such pleas would assuredly be forthcoming can be seen from the following.

III. B. Library Photocopying Is Clearly Threatened in the Present Suit

Having presented its argument that the instant suit threatens library photocopying as practiced by the ALA's members to the Court of Claims, and that argument having been adequately

summarized and well received by the majority, the ALA will allow the majority to speak to this point on its behalf. Petitioner's counter argument is that all it seeks is reasonable compensation through licensing arrangements. Having considered both sides of the question, the majority stated as follows:

> Plaintiff's answer is that it is willing to license the libraries, on payment of a reasonable royalty, to continue photocopying as they have. Our difficulty with that response—in addition to the absence of proof that plaintiff has yet been hurt, and the twin doubts whether plaintiff has a viable license system and whether any satisfactory program can be created without legislation—is that the 1909 Act does not provide for compulsory licensing in this field. All that a court can do is to determine the photocopying an infringement, *leaving it to the owner to decide whether to license or to prohibit the practice.* Plaintiff and other publishers cannot enjoin governmental libraries (because 28 U.S.C. § 1498, *supra* note 1, is the sole remedy), but *if photocopying of this type is an infringement the owners are free under the law to seek to enjoin any and all non-governmental libraries.* A licensing system would be *purely voluntary* with the copyright proprietor. We consider it entirely beyond judicial power, under the 1909 Act, to order an owner to institute such a system if he does not wish to. We think it equally outside a court's present competence to turn the determination of "fair use" on the owner's willingness to license—to hold that photocopying (without royalty payments) is not "fair use" if the owner is willing to license at reasonable rates but becomes a "fair use" if the owner is adamant and refuses all permission (or seeks to charge excessive fees). (487 F.2d at 1360; emphasis added, footnotes omitted.)

Absent hypothetical license agreements, non-governmental libraries would be compelled to cease immediately all preparation of photocopies. To do otherwise would subject each library to injunctive relief and to minimum statutory relief computed on a per copy basis. As a practical matter, a decision in Petitioner's favor would result in the immediate demise of the Interlibrary

Loan Program and place a majority of the nation's library resources beyond the reach of scholars, scientists, and researchers.

III. C. Royalties on Library Photocopying Would Impose Onerous Economic and Administrative Burdens on Libraries

The majority of the Court Claims, however, stopped short of considering certain other practical consequences of a decision in favor of the Petitioner, even if every owner of a copyright in a professional journal committed not to seek injunctive relief against non-government libraries. Overwhelming economic and administrative burdens would nevertheless ensue for such libraries.

Assuming further, for the sake of argument, that all copyright owners were willing to license photocopying on a "reasonable" basis,[26] it must be recognized that all monies a library may be required to spend in payment for or collection of photocopying royalties must be taken from its other functions, such as acquisitions of new materials to improve its collection. Thus, imposition of royalties on library photocopying would necessarily limit access to written works by decreasing the library's ability to acquire such works.

Moreover, to the extent that the burden of royalties could be passed on to the scientist, researcher, or scholar, such limitations would be even more direct. In this regard, a practicing physician testified in this case that:

> There are great variations in interest in getting an article. I mean, some you must have, and others you say you'd like to have, and so on; and I think all of us have that small germ of persimony, or whatever you call it, and frugality. So that there, very definitely, when you know

26. Back in the real world, as to Petitioner's own proposed licensing plan, the ALA drew the attention of the majority below to the fact that it would not apply to interlibrary loans or to requests from persons not physically present in the library building.

there is going to be a charge, you, if it is a borderline situation, say, "Well, I won't bother." (T. 922-3.)

And most importantly, if the burdens were passed on, the fair use defense which is available to almost every library patron would be a nullity. The library could not determine which few of its patrons were not entitled to this defense and would have to sacrifice the interests of *all* its patrons through the collection of royalties from each of them. This is what Petitioner desires them to do, as it would certainly make plaintiff's life easier and result in a windfall profit to it and other publishers. Using the same rationale, however, the owner of a copyright in a musical composition would be permitted to collect performance fee royalties from *record manufacturers* for *every record* sold by them, regardless of the fact that 99% of such records are sold for in-home use, and only 1% are sold for performance in restaurants, on radio shows, etc. The absurdity of this proposition should not be lost sight of in the context of the present case.

Moreover, regardless of whose pockets the royalty payments come from, the administrative costs to the libraries in merely collecting, accounting for, and distributing the royalties would be substantial and could well exceed the amount of royalties collected. (T. 486-88, 614.) This Court should consider the practical problems which would be involved were an academic, research, or public library to attempt to secure separate royalty agreements for the literally thousands of copyrighted journal items in its collection. It should consider the problems of merely determining with whom the agreement should be negotiated and if one is necessary in respect of a given article. Better yet, this Court should leave such considerations to the legislature, where they can best be accommodated.

An indication of the magnitude of these problems is found in the instant case. Defendants argued that the plaintiff was neither a copyright proprietor nor the real party-in-interest and therefore did not have standing to bring the instant lawsuit. In

support of its position, defendant cited, for example, the agreement relating to copyright between the American Association of Immunologists and Petitioner, under which the Journal of Immunology is published, and which provides in relevant part:

> 5. Procurement of Copyright. The Association is the owner of the periodical but for the convenience of both parties copyright shall be procured by and in the name of the Publisher, and the costs incident thereto shall be charged to the profit-and-loss account of the periodical. *The Association reserves the right to have the copyright assigned to the Association if at any time in the future this seems desirable.* (emphasis supplied.)

The majority below did not consider this question, stating that:

> We assume, for the purpose of the case, but without deciding, that plaintiff is the proper copyright owner and is entitled to sue here . . . (487 F.2d at 1349).

but it further noted that:

> Defendant vigorously contests the publisher's claim to be the copyright "proprietor" and its right to sue in this court. The argument is that the individual authors of the articles are the owners and they have not assigned their rights to plaintiff. (487 F.2d at 1349 n. 5.)

However, assumptions aside, the problems that libraries would encounter in merely determining the person or persons with whom royalty arrangements are to be negotiated for a given article or journal are obvious.[27]

Furthermore, many of the journals photocopied contain much uncopyrighted or uncopyrightable material such as government reports (17 U.S.C. § 8) and public domain material. Of course, whatever copyrights may exist in the journal as a whole do not,

27. Moreover, a copyright notice only identifies the copyright proprietor as of the date of publication. If, in the meantime, the copyright is assigned to another person, or if an individual copyright owner dies, or if a copyright is renewed by someone other than the original owner, the copyright notice necessarily would not reflect the true identity of the copyright owner.

and cannot, cover such material.[28] *Sawyer* v. *Crowell Publishing Co.*, 46 F.Supp. 471 (S.D.N.Y. 1942). However, it would be impossible for a library to determine which articles or material in a supposedly copyrighted journal were properly subject to a claim for photocopying royalties without an undue amount of research and potential dispute with the proprietor. Administrative feasibility would require the libraries to pay or collect royalties on every page photocopied. The result would again be a windfall profit to publishers, and the unwarranted taxation of scientists, researchers, and scholars for access to materials which they are clearly free to use without charge.

And even if those articles in a given journal requiring royalty payments and the proper person with whom rates for that article should be negotiated could be readily identified, this Court should further consider the fact that there are thousands of journals, each containing many articles, in the collections of most of the ALA's members.[29] This further suggests the problems which would inhere in libraries' accounting for royalties due under each separate agreement they negotiate.

The foregoing practical considerations are in no way eliminated by Petitioner's statements that:

> [T]his lawsuit was brought to achieve some legal recognition of the rights of publishers by libraries so that dialogue would be possible with the objective of reasonable financial accommodation of both sides. (Pet. Br. at 29.)

Petitioner has made it clear that it prefers automatic

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28. 17 U.S.C. § 3 clearly recognizes that a composite work covered by a blanket copyright might contain uncopyrighted material:

> The copyright provided by this title shall protect all the *copyrightable components* of the work copyrighted. (emphasis added.)

29. The administrative complexities of negotiating royalty agreements with every owner (assuming he could be identified and located) of every potentially copyrighted work in a library collection are completely beyond comprehension. According to published U.S. Government statistics, in 1969 alone the Copyright Office issued 80,807 new copyright registrations for periodicals. *(Report of the Librarian of Congress*, 1969, p. 97.)

> blanket licensing without any need for record keeping. (Pet. Br. at 37.)

As indicated above, the questions still remain: "Who will the dialogue be between—who are the copyright proprietors?"; "What happens when the dialogue breaks down in individual circumstances?;" "What will be the cost of the dialogue itself?;" "How can blanket licensing make allowances for non-copyrighted materials and for fair use of copyrighted materials?"

There is simply no question that libraries, confronted with the alternative of ceasing all photocopying or seeking royalty agreements from copyright owners, will be forced to choose the former. Absent a legislative scheme that takes into account the proper scholarly objectives of libraries, the problems associated with royalty agreements make it obvious that libraries will really have no alternative.

If, what Petitioner is intimating, but is afraid of suggesting outright, is the advisability of some ASCAP-type of clearing house system, the easy answer is that there is none in existence and, in the words of the majority of the Court of Claims:

> There is also debate over whether a feasible ASCAP-type or clearinghouse system can be developed without legislation and, if so whether it would be desirable. (487 F.2d at 1360 n. 24.)

We close this "practical consideration" section with another quote from the opinion of the majority below, which ties together what has been said above:

> The truth is that this is now preeminently a problem for Congress: to decide the extent photocopying should be allowed, the questions of a compulsory license and the payments (if any) to the copyright owners, the system for collecting those payments (lump-sum, clearing-house, etc.), the special status (if any) of scientific and educational needs. Obviously there is much to be said on all sides. The choices involve economic, social, and policy factors which are far better sifted by a legislature. The possible intermediate solutions are also of the pragmatic kind legislatures, not courts, can and should fashion. (487 F.2d at 1360.)

POINT IV

CONCLUSION

It is submitted that the practice of library photocopying, which has gone unchallenged for many decades, is not within the ambit of the limited copyright monopoly conferred by the Copyright Act of 1909. To the extent there is any doubt on that point, the practice is nevertheless clearly within the privilege of fair use extended to scientists, researchers, and scholars who obtain access to written works by means of single photocopies for purposes of practical application of their teachings. The privilege is not destroyed when a library makes the single photocopy at the request of and for the benefit of the scientist, researcher, or scholar. It is further submitted that the practical consequences of a holding that this traditional practice constitutes copyright infringement would be to completely halt the practice, resulting in a denial of access to recorded knowledge to those persons who would otherwise use it to promote the progress of science and the useful arts.

This Brief *Amicus Curiae* of the American Library Association is filed with the consent of both parties. Letters of consent for filing of both parties are attached hereto as Appendices A and B.

Respectfully submitted,

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APPENDIX A

Law Offices
COWAN, LIEBOWITZ & LATMAN, P. C.
200 East 42nd Street
New York, N. Y. 10017

July 23, 1974

William D. North, Esq.
Kirkland & Ellis
200 East Randolph Drive
Chicago, Ill. 60601

Re: The William & Wilkins Company v. United States,
Supreme Court Docket No. 73-1279

Dear Mr. North:

Pursuant to your request, petitioner, The William & Wilkins Company, consents to the filing of a brief *amicus curiae* in the above matter on behalf of the American Library Association.

Sincerely yours,

/s/ ALAN LATMAN
Alan Latman

AL:DM

APPENDIX B

OFFICE OF THE SOLICITOR GENERAL
Washington, D. C. 20530

July 23, 1974

William D. North, Esq.
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601

Re: Williams & Wilkins Co. v. United States, No. 73-1279, October Term, 1973

Dear Mr. North:

In response to the request in your letter of July 19, I hereby consent to your filing a brief amicus curiae in the above-entitled case on behalf of the American Library Association.

Sincerely,

/s/ ROBERT H. BORK
Robert H. Bork
Solicitor General

LIBRARY SUPREME COURT, U. S.

FILED
SEP 7 1974
MICHAEL RODAK, JR., CLERK

Submitted with the Consent of the Parties

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No 73-1279

THE WILLIAMS & WILKINS CO.,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF AMICUS CURIAE OF THE SPECIAL LIBRARIES ASSOCIATION

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QUESTION PRESENTED

The true question[1] posed in this case, and that which clearly affects the interests of the Special Libraries Association (the "SLA"), is:

> Whether not-for-profit academic, research, and public libraries are liable for copyright infringement as a result of their long-standing practice of making single photocopies of portions of copyrighted works at the request and for the use of readers engaged in scientific and scholarly research.

1. Petitioner admits (see Petitioner's Brief at 29) that the decision of this Court on the facts here present will constitute precedent reaching well beyond the instant parties.

The SLA respectfully submits that the question set forth above represents the parameters of this case far more accurately than does the superficially narrow question framed by Petitioner.[2] The SLA urges this Court to consider the issues before it in their proper perspective—as vitally affecting the interests not only of governmental libraries but libraries of the private sector as well.

Interest of the Special Libraries Association

The Special Libraries Association (SLA), organized in 1909, is a non-profit educational corporation incorporated and existing under the laws of the State of New York. Its 8,500 members make it the second largest library and information-oriented organization in the United States.

The SLA represents more than 10,000 special libraries in the United States, including libraries and information centers maintained by corporations, associations, government agencies, and other individuals or groups. It further includes specialized or departmental collections within an academic or public library.

The objective of SLA is to promote and improve the communication, dissemination, and use of information in areas such as the physical, biological, technical and social sciences, and the humanities to the end that such information may serve the general welfare and the advancement of mankind. Specialized libraries emphasize specialized information services for a specialized clientele. The Legislative Reference Service of the Library of Congress and the Supreme Court of the United States Library are prime examples of the type of specialized libraries represented by SLA.

The interest of the SLA in the present case is directly related to its vital concern that access to informational resources be protected and preserved.

The SLA is convinced that a decision in favor of Williams & Wilkins will effectively limit access to information in journals

2. Petitioner's Brief at 2.

and periodicals which is absolutely essential to a functioning economy and society.

The essence of the claim asserted by Petitioner is that the making of a photocopy of a copyrighted work by a library for educational and scientific purposes is an infringement of copyright. Acceptance of this claim would effectively confine scientific, industrial, governmental, and academic research to a few major library collections and introduce an institutional parochialism utterly incompatible with the needs of our modern scientific and technological society. Moreover, it would deprive large segments of the public of the most current sources of information.

The realities of the present situation as regards dissemination of library periodical resources may be summarized as follows.

First, no single library has, or could afford to have, in its collection, no matter how large, all periodicals and journals. As a consequence, most meaningful research efforts involving journal or periodical information can be undertaken only if the collections of a number of libraries are accessible. Moreover, most research efforts cannot avoid recourse to information contained in journals and periodicals.

Second, full access to library collections of journals and periodicals is available only through photocopies. This is true because cost and space limitations dictate that libraries bind at most one or two copies and discard the rest. Libraries will rarely loan to a patron of another library a bound volume of periodicals because to do so would limit the access of its own patrons to such works.

Third, no copyright proprietor of periodical works has, until now, claimed the right to prohibit library photocopying in lieu of interlibrary loan. This, despite the fact that such practices prevailed when the Copyright Act of 1909 was enacted, were formalized in the first Interlibrary Loan Code in 1917, and have continued unquestioned for nearly sixty-five years.

Fourth, copyright proprietors of periodical works, with perhaps a bare handful of exceptions, have no capacity to provide reprints upon request and no administrative capacity to respond to requests for permission in a meaningful time frame. Many, if not most, copyright proprietors of periodical works do not even have complete sets of back issues of their own works.

Fifth, libraries will not make a photocopy in lieu of interlibrary loan if to do so would expose them to a suit for infringement and statutory damages. The cost of raising and sustaining the defense of "fair use" (unless library photocopying was *per se* a "fair use") alone would be prohibitive.

If the making of a library photocopy is an infringement of copyright, and is not *per se* a fair use of copyrighted material, then access to essential information becomes dependent entirely on the ability or willingness of the copyright proprietor to grant permission to copy or to provide a suitable reprint. There is no evidence, historical or otherwise, that copyright proprietors (with rare exceptions) are either willing or able to process requests for reprints or permissions on an individual single copy basis as is done by libraries. Nor are they required to do so under the copyright law. That law contains no provision for mandatory or blanket licensing of printed materials. Nor does it require the copyright proprietor to maintain copyrighted works in print and available. There is nothing in the copyright law to prevent the copyright proprietor from totally ignoring the requests of libraries and library users for access to his works if, in his absolute discretion, he deems a response uneconomic or inconvenient.

To ignore such requests is effectively to suppress access to the work. Moreover, suppression of access is tantamount, in the case of most journals and periodicals, to suppression of the work itself as an intellectual resource. The utility of a work, and hence its value, is not mererly a function of its existence "somewhere" but of its availability "everywhere."

In substance, Petitioner is claiming the absolute right to suppress, at its will or at its whim, any journal or periodical work for which it holds the copyright. Petitioner cloaks that claim here under the disguise of a mere claim for reasonable compensation. But Petitioner cannot hide the true thrust of its ultimate goal—the ability to dictate its own economic terms because of its ability to *enjoin* any library photocopying done without the permission it seeks from this Court's decision.

We submit that neither the Constitution nor the Congress which enacted the Copyright Act of 1909 contemplated that the copyright law would or should vest such power in a copyright proprietor. Nor has such right ever been asserted or recognized in the history of copyright legislation.

In the past, when technological developments have seemed to jeopardize the economic interests of the author in his works, the Courts have looked to Congress to find an accommodation between those interests and the public interest in access to such works. SLA believes that to the extent photocopying may be deemed such a development, the same recourse is appropriate and readily available.

The decision of this Court in this case will determine for the foreseeable future whether this nation's vast wealth of periodical and journal literature will continue to exist as an information resource accessible to all who need to know. If Petitioner is allowed to prevail, access to knowledge, and hence educational opportunity, will become merely a function of geography.

SLA does not believe such a result is Constitutionally required or socially acceptable.

ARGUMENT

The arguments upon which SLA relies in its support of Respondent may be briefly enumerated.

First, the limited monopoly powers granted to copyright proprietors should be strictly construed in a manner consistent with

the Constitutional purpose of copyright, which is to promote—and not to impede—science and the useful arts.

Second, the Copyright Act of 1909 was not intended by Congress to extend to library photocopying practices in effect at the time of its enactment and continued without challenge openly and with full knowledge of copyright proprietors for sixty-five years thereafter.

Third, this Court has consistently refused to extend the copyright monopoly where the functions of the copyright proprietor are not the same as those of the alleged infringer. There exists a significant and fundamental functional distinction between publishing and library photocopying.

Fourth, even if library photocopying is found to be technically within the limited copyright monopoly, it should be excused as a reasonable and indispensable extension of the "fair use" defense traditionally available to scientists, researchers, and scholars seeking access to copyrighted works. That which such persons are entitled to do for themselves simply should not be impeded when done for them and on their behalves.

Fifth, if library photocopying practices are declared an infringement, interlibrary loan of journals and periodicals will effectively be suspended with the result that access to much of the world's most significant and current information and knowledge will become unavailable to those who need to utilize that information and knowledge.

The foregoing arguments of SLA are in summary essentially the same as those advanced by the American Library Association as Amicus Curiae in support of Respondent.

Since the American Library Association has developed these arguments in depth and comprehensively and has cited the Court to all relevant authority, SLA will not burden the Court with an independent but essentially duplicatory argument. Rather, SLA hereby adopts at its own and urges to this Court the arguments set forth at length in the Brief Amicus Curiae of the American Library Association.

CONCLUSION

The SLA respectfully submits that the Court should affirm the decision of the United States Court of Claims.

This Brief is filed with the consent of both parties. Letters of consent from each party are attached hereto as Appendices A and B.

Respectfully submitted,

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APPENDIX A

Law Offices
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200 East 42nd Street
New York, N. Y. 10017

July 29, 1974

William D. North, Esq.
Kirkland & Ellis
200 East Randolph Drive
Chicago, Ill. 60601

Re: Williams & Wilkins Company v. United States, No.
preme Court Docket No. 73-1279

Dear Mr. North:

Pursuant to your request, petitioner, The Williams & Wilkins Company, consents to the filing of a brief *amicus curiae* in the above matter on behalf of the Special Libraries Association.

Sincerely yours,

/s/ ALAN LATMAN
Alan Latman

AL:DM

APPENDIX B

OFFICE OF THE SOLICITOR GENERAL
Washington, D. C. 20530

William D. North, Esq.
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601

Re: William & Wilkins Company v. United States, No. 73-1279

Dear Mr. North:

As requested in your letter of July 24, I hereby consent to your filing a brief amicus curiae in the above-captioned case on behalf of the Special Libraries Association.

Sincerely,

/s/ ROBERT H. BORK
Robert H. Bork
Solicitor General

SUPREME COURT, U. S

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
FILED
SEP 9 1974
MICHAEL RODAK, JR., CLERK

No. 73-1279

THE WILLIAMS & WILKINS CO.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

BRIEF OF AMICI CURIAE—ASSOCIATION OF RESEARCH LIBRARIES, MEDICAL LIBRARY ASSOCIATION, AMERICAN ASSOCIATION OF LAW LIBRARIES, ASSOCIATION OF AMERICAN UNIVERSITIES, AMERICAN MEDICAL ASSOCIATION, AMERICAN DENTAL ASSOCIATION, AMERICAN ASSOCIATION OF DENTAL SCHOOLS, ROBERT H. EBERT, M.D. (IN HIS CAPACITY AS DEAN OF THE FACULTY OF MEDICINE, HARVARD MEDICAL SCHOOL), THE UNIVERSITY OF MICHIGAN MEDICAL SCHOOL, AMERICAN SOCIOLOGICAL ASSOCIATION, MODERN LANGUAGE ASSOCIATION OF AMERICA, HISTORY OF SCIENCE SOCIETY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 2

QUESTION PRESENTED 5

COUNTERSTATEMENT OF THE CASE 6

SUMMARY OF ARGUMENT 11

ARGUMENT

I. PRELIMINARY STATEMENT 13

II. THE CONSTITUTIONAL POLICY UNDERLYING THE LIMITED EXCLUSIVE RIGHTS GRANTED TO AUTHORS AND INVENTORS REQUIRES THE RESULT REACHED BY THE COURT OF CLAIMS 18

III. THE STATUTORY PROVISIONS GOVERNING COPYRIGHT DO NOT AUTHORIZE AN AWARD OF COMPENSATION IN THIS CASE 22

A. A library does not invade any "exclusive right" created by Section 1 of the Copyright Act when, at the request of a reader, it makes a single copy of an article in a periodical. 23

1. Prior to the Copyright Act of 1909 mere copying of material in a book, without more, did not constitute an infringement of copyright. 23

2. Congress did not change this rule in 1909. 28

3. The copying practices followed by the Library of Congress prior to and following the passage of the 1909 Act support this interpretation. 34

Page

4. Single-copy photocopying also does not infringe the exclusive right to "print, reprint, publish . . . and vend." 39

B. The single-copy practice is a reasonable and customary use of material in a library's collection and is not an infringement of copyright. 46

1. A use of copyrighted material which is a "fair use" is not an infringement. 46

2. The Petitioner erroneously seeks to limit the discussion of "fair use" to criteria which do not apply to the present case. 49

3. The Court of Claims applied proper criteria and reached the correct conclusion. 56

IV. FOR ADDITIONAL REASONS NOT RELIED ON BY THE COURT OF CLAIMS THE PETITIONER IS NOT ENTITLED TO PREVAIL 60

A. The proposal the Petitioner now advances for additional compensation for uses of copyrighted material after payment for the periodical is not authorized by the Copyright Act and would extend copyright beyond its proper bounds. 60

B. It was not established that the rights conferred on the Petitioner by the authors of the copied articles included the right to bring this suit. 66

CONCLUSION 73

Page

TABLE OF AUTHORITIES

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Page

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Independent News Co. v. Williams, 293 F.2d 510 (3d Cir. 1961) 40

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Page

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17 U.S.C. §1(a) 7, 12, 17, 18, 22, 23, 28, 30, 33, 39, 39, 40, 42, 43, 44, 46, 55

17 U.S.C. §3 52

17 U.S.C. §10 43

17 U.S.C. §27 40

Page

17 U.S.C. §101 . . . . . 7, 63

17 U.S.C. §112 63

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Page

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Records and Briefs:

Brief for American Chemical Society as Amicus Curiae 61

Brief for American Guild of Authors and Composers *et al.* as Amici Curiae 43

Brief for Associated Councils of the Arts as Amicus Curiae 50, 61

Brief for Association of American Publishers, Inc. *et al.* as Amici Curiae 50

Brief for Association of Research Libraries *et al.* as Amici Curiae to Court of Claims 9

Brief for Authors League of America, Inc. as Amicus Curiae 20, 42, 43, 44, 60, 61, 62, 64

Brief for Magazine Publishers Association as Amicus Curiae 50, 51, 52

Petitioner's Brief 5, 6, 9, 15, 20, 21, 48-50, 51, 52, 58, 59, 60, 61-62, 63, 64

IN THE

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OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,

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v.

THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

BRIEF OF AMICI CURIAE–ASSOCIATION OF RESEARCH LIBRARIES, MEDICAL LIBRARY ASSOCIATION, AMERICAN ASSOCIATION OF LAW LIBRARIES, ASSOCIATION OF AMERICAN UNIVERSITIES, AMERICAN MEDICAL ASSOCIATION, AMERICAN DENTAL ASSOCIATION, AMERICAN ASSOCIATION OF DENTAL SCHOOLS, ROBERT H. EBERT, M.D. (IN HIS CAPACITY AS DEAN OF THE FACULTY OF MEDICINE, HARVARD MEDICAL SCHOOL), THE UNIVERSITY OF MICHIGAN MEDICAL SCHOOL, AMERICAN SOCIOLOGICAL ASSOCIATION, MODERN LANGUAGE ASSOCIATION OF AMERICA, HISTORY OF SCIENCE SOCIETY

This brief is submitted by the Association of Research Libraries, Medical Library Association, American Association of Law Libraries, Association of American

Universities, American Medical Association, American Dental Association, American Association of Dental Schools, Robert H. Ebert, M.D. (in his capacity as Dean of the Faculty of Medicine, Harvard Medical School), University of Michigan Medical School, American Sociological Association, Modern Language Association of America, and the History of Science Society. The consent of Petitioner and Respondent to the filing of this brief has been obtained.

INTEREST OF AMICI

The amici who join in this brief represent a broad cross-section of research and specialty libraries and their users who are deeply involved in scholarship, research and the dissemination of scientific knowledge.

For generations, and without any legal challenge, such libraries have made freely available to their users for personal use copies of copyrighted materials in their collections, including articles in issues of medical journals such as those involved in this case. Indeed, such practices were expressly approved by representatives of the publishing world in a "Gentlemen's Agreement" in the 1930's. (Finding 41(a), C. App. 95-97.)[1]

The unhampered continuation of these practices is essential to the free flow of ideas and to the welfare of

[1] References herein to the Appendix to the Petitioner's Brief are denominated "App."; references to the Appendix to the Petition for Certiorari are denominated "C. App."; and references to the trial transcript are denominated "Tr.".

scholarship and research in the United States and throughout the world. These amici submit that these practices are entirely lawful and that the Supreme Court of the United States should affirm the decision of the U.S. Court of Claims to that effect.

The amici are intimately familiar with present and historical practices concerning the exchange of information among scholars and researchers. The Association of Research Libraries is a nonprofit educational association comprising the largest and most comprehensive research libraries in North America. The Medical Library Association is a professional organization, membership in which is open to medical libraries and those working in or interested in medical libraries. The American Association of Law Libraries is a nonprofit professional organization made up of individuals and institutions interested in increasing the usefulness of law libraries, cultivating the science of law librarianship and fostering a spirit of cooperation among members of the profession.

The American Medical Association (AMA) represents approximately sixty percent of the nation's physicians. The Association permits the scientific community to reproduce single copies of articles from the Association's copyrighted publications for individual use, and the AMA has not found any impairment of its copyright protection from observance of this policy. The American Dental Association represents approximately eighty-five percent of the dentists in the United States. The American Association of Dental Schools is composed of the principal institutions of education and research in the field of dentistry.

Harvard Medical School (represented by its Dean, Dr. Ebert) operates and maintains the Francis A. Countway Library of Medicine. The Countway Library combines the Boston Medical Library and Harvard Medical Library and serves the Harvard Medical School, its twenty-two teaching hospitals, and the Boston medical community at large. The Countway is the preeminent bio-medical research library in the New England region and, as the regional medical library, is supported as such by the Federal government under the Medical Library Assistance Act of 1965, 42 U.S.C. §280(b).[2] The Countway currently subscribes to over 5,000 journals, including those published by The Williams & Wilkins Company. The University of Michigan Medical School is one of the nation's leading public medical schools and operates a substantial medical library.

The Association of American Universities is an association of many of the preeminent institutions of higher education in this country. The American Sociological Society, the Modern Language Association of America and the History of Science Society are professional societies dedicated to fostering knowledge and advancing the professional interests of their members in their respective disciplines.

A large part of the copyrighted material with which the researchers, educators and academicians who are members of professional associations are concerned is the product of the scholarly activities of their own members. The purpose of these members in publishing the results of their research and scholarship is to effect a wide dissemination of those results in the scholarly

[2] Act of Oct. 22, 1965, §2, 79 Stat. 1059.

world. They seldom anticipate any significant remuneration in connection with these publications. Rather, they are pleased when other scholars seek copies of their works. They have long assumed that the copying done by other scholars for their scholarly and educational activities is permissible under the "fair use" doctrine and other provisions of the copyright law. For example, the Modern Language Association of America publishes a substantial journal and other occasional publications on which copyright protection has been secured since 1965 without any intention or attempt by the Association to limit the type of copying by a library for its users that is at issue in this case.

QUESTION PRESENTED

The question presented, simply put, is whether, in the particular instances of photocopying on which Petitioner based this suit, copyright is infringed when a library makes a copy of an article in a medical journal in response to the request for such a copy by a reader for his personal use and not for reproduction or distribution.

The Petitioner, however, has formulated the question presented by this case as being whether "systematic reproduction" of copyrighted journal articles constitutes "fair use" or copyright infringement. The Court should note that "systematic reproduction" is a new term which was not employed by the Petitioner in presenting its case in the Court of Claims nor used by that Court in its decision. As Petitioner explains (Pet. Br. 38, n.

27), the Senate Judiciary Committee has reported out a copyright revision bill which, in recognizing a "limited library exemption as to single copies of journal articles," would provide that such an exemption would be inapplicable in the case of "systematic reproduction or distribution." Petitioner thus appears to be trying to foreclose the issue in this case by characterizing the single-copying here involved as a type of systematic reproduction which would not be allowed if the pending bill were enacted in its present form.

It is conceded that the National Library of Medicine (NLM) and the library at the National Institutes of Health (NIH) have developed efficient systems for responding to requests for copies of articles in publications in their collections. But the issue in this case is not whether the libraries perform this service in a "systematic" or in an unsystematic manner, but whether the single-copy service they render constitutes infringement under the 1909 Copyright Act.

COUNTERSTATEMENT OF THE CASE

This case is the first case known to these amici in which claim of copyright has been advanced to challenge "single-copy" photocopying for personal use. The Petitioner, a publisher of medical journals, is asking this Court "to direct an award of reasonable compensation to be paid by the Government for its use of Petitioner's property." (Pet. Br. 49.) In so doing, the Petitioner seeks reversal of the Court of Claims' decision which upheld, as a justifiable and legally supportable exception from copyright, the longstanding

practice of libraries to make or permit the making of a single copy of a journal article for the personal use of the requester. To grant the Petitioner the relief desired would extend the copyright law to practices not heretofore covered, solely for commercial reasons and at an incalculable cost to the promotion of science and the useful arts.[3]

For its claim of right Petitioner relies on Section 1(a) of the Copyright Act.[4] However, because the alleged infringers are Government libraries, Petitioner must rely for its remedy, not on the infringement provision of the Copyright Act, but on 28 U.S.C. §1498(b),[5] in which Congress in 1960 established an exclusive remedy for copyright infringement by Government agencies and contractors. In a suit for infringement under Section 101 of the Copyright Act a plaintiff is entitled to both an injunction and damages which, by the terms of Section 101(b), shall not exceed $5,000 nor be less than $250 for each infringement.[6] Under 28 U.S.C. §1498(b), on the other hand, no injunction is available, and the copyright proprietor's remedy for infringement is "the recovery of his reasonable and entire compensation as damages for such infringement, including the minimum statutory damages as set forth in section 101(b) of title 17, United States Code. . . ." Petitioner's brief emphasizes that no injunction could issue in this

[3] *See* U.S. CONST. art. I, §8.

[4] 17 U.S.C. §1(a), Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075.

[5] Act of Sept. 8, 1960, 74 Stat. 855.

[6] Act of July 30, 1947, ch. 391, 61 Stat. 661; Act of June 25, 1948, ch. 646, §39, 62 Stat. 992.

case. But a decision in favor of Petitioner could constitute a precedent for possible future cases in which an injunction could issue – to the serious detriment of scholarship and research.

The action in this case was based on thirteen instances of alleged infringement, on various dates in 1967 and 1968, of copyright in eight articles which appeared between 1957 and 1965 in an issue of one or another of four medical journals published by the Petitioner. (Finding 4, C. App. 71-72; Finding 6(b), C. App. 75.) In twelve instances a Government physician or other professional person employed by the National Institutes of Health requested and received from the NIH library a photocopy for his professional use of one of the eight articles in question. (Finding 6(b), C. App. 76.) In the remaining instance, which occurred in January 1968, a doctor assigned to an Army hospital in Japan requested and received from the National Library of Medicine, through its "inter-library loan" procedures, a copy of an article which had been published more than nine years earlier, also for his professional use. (*Id.*)

Amici who addressed the Court below, representing both governmental and non-governmental libraries and library users, supported the Government's position that in none of the thirteen instances was the copying of the article an infringement of copyright. The libraries argued, in particular, that it is and has been an established and recognized practice for a user of a library collection to be permitted to make a single copy for personal use of copyrighted material in the collection or, in the alternative, for the library itself to make such a single copy for the user at the user's

request.[7] A majority of the Court concluded that the plaintiff was not entitled to recover.

Before the Court of Claims the attorney for the plaintiff contended that the making of a single copy of an entire article in a medical journal can never be lawful. Before this Court he states that: "Petitioner would not have sued for the making of a truly single copy." (Pet. Br. 41.) He does not, however, explicitly concede the lawfulness of the "single-copy" practice.

To understand the relevance of this "single-copy" practice it is important to understand precisely the acts of infringement for which the Petitioner brought suit. One act involved the National Library of Medicine (NLM). The remainder involved the library of the National Institutes of Health (NIH). Since it is the NLM to which Petitioner and the amicus briefs supporting the Petitioner direct their primary attention, we will refer first to the single instance of copying of a medical journal article by the NLM.

National Library of Medicine

On January 11, 1968 NLM made a photocopy, at the request of Dr. James L. Pitcher (Finding 6(b), C. App. 75), of an article written by Dr. R.G.F. Parker on *Occlusion of the Hepatic Veins in Man* which had been published nearly ten years earlier in the December 1959 issue of MEDICINE. (Finding 4, C. App. 72.) At the time, Dr. Pitcher was stationed in Japan, and the request for a copy of the article was made through an

[7] *See, generally*, Brief for the Association of Research Libraries, *et al.* as amici curiae to the Court of Claims.

Army hospital library in that country. (*See* Finding 6, C. App. 76.) It was NLM's stated policy not to fill requests for copies of articles from an issue of any of 104 medical journals on a "widely-available list" (which included all four of the journals involved in this suit) unless the issue of the journal was more than five years old (Finding 22(b), C. App. 85), but this restriction did not apply in this case.[8] A copy was made and forwarded to Dr. Pitcher in Japan for his use which involved patient care.

The complaint alleged no other instance in which NLM made a copy of any article for any purpose. We do not suggest that no other copies of this article or other articles were made by NLM for other doctors on other occasions. It is simply that the particular circumstances of other instances of copying by NLM were not established in the Court below. On the other hand, the Court found that requests for more than one copy of a journal article are rejected by NLM, without exception. (*See* Finding 22(c), C. App. 85.)

National Institutes of Health

In the case of NIH, the complaint charged twelve incidents of copying involving eight articles in five issues of four medical journals published between June 1957 and November 1965. (Finding 4, C. App. 71-72; Finding 6(b), C. App. 75.) The copying occurred

[8]In addition, it appears that requests from *Government* libraries are not rejected on the basis of the "widely-available list." See the last sentence of Finding 22(b), C. App. 85.

between September 1967 and December 1968. (Finding 6(b), C. App. 75.)

The NIH library subscribes to two copies of each of the four journals. (Finding 14, C. App. 79.) One copy is retained in the library for the use of readers and one copy circulates. (Finding 17(a), C. App. 80.)

At the request of interested personnel the NIH library will make a photocopy of an article in a medical journal in its collection, subject to certain general rules, among them a provision that only a single copy of a journal article will be made per request and then that each request is normally limited to about forty to fifty pages. (Finding 17(a), C. App. 80-81.) In each of the twelve instances of copying the requester was a physician or other professional employee who requested the article in connection with medical research work or patient care. (Finding 6(b), C. App. 76.) Trial testimony by Dr. Benjamin M. Banks, the author of one of the articles in question, indicated that he personally subscribed to six professional journals. (Tr. 900.) Testimony of Dr. J.L. Starr, the author of another one of the articles, indicated that he subscribed to most of the journals of interest to him, but that economic considerations prevented him from purchasing journals in which he was only interested in a single article. (Tr. 715-16.)

SUMMARY OF ARGUMENT

The constitutional purpose of copyright protection is "To promote the Progress of Science and the useful

Arts".[9] Affirmance of the decision below would serve this purpose.

Congress did not intend, by the choice of words used in defining the "exclusive rights" of authors in Section 1(a) of the Copyright Act of 1909,[10] to prohibit a library from performing one of the most basic library functions – making published material in its collection available to an individual reader for the reader's own use, whether by lending the material itself or by means of a photocopy made by the reader or at the reader's request. The "single-copy" practice of libraries is a reasonable and customary use of material in a library's collection which is not an infringement of copyright. Such use falls within the "fair use" exception to copyright and is clearly distinguishable from copying for purposes of republication and commercial exploitation.

The Petitioner and the amici which support its position are seeking additional compensation for normal library uses of copyrighted material after the library has purchased the material from the publisher. Such additional compensation is not authorized by law and would extend copyright beyond its proper bounds. Moreover, the Petitioner has not established that it has been authorized by the authors of the medical journal articles to bring suits for infringement on the basis of the particular uses alleged in Petitioner's complaint.

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[9] U.S. CONST. art. I, §8.

[10] 17 U.S.C. §1(a).

ARGUMENT

I.

PRELIMINARY STATEMENT

Article I, Section 8 of the Constitution empowers Congress to grant to authors exclusive rights in their writings, for a limited time, in order to "Promote the progress of Science and useful Arts. . . ." A review of copyright legislation going back to the original Copyright Act of 1790[11] makes clear the "exclusive right" granted to authors pursuant to Article I, Section 8 does not prohibit an individual from copying from the author's work for personal use. A library's normal use of materials in its collection, including single-copy photocopying for personal use, similarly does not invade the exclusive right granted by the copyright laws and is a reasonable and customary use of materials in the library's collection.

Once an author has secured copyright protection by the general publication of his work, the Copyright Act confers on him for a limited time certain rights to prevent others from making public uses of that work. He can prevent the publication and distribution of a new edition of his work and he can prevent excessive use of material from his work in a work published by another.

This case is not concerned with such public uses of copyrighted materials. It is concerned, rather, with the use for scholarly and professional purposes of copy-

[11] Act of May 31, 1790, ch. 15, 1 Stat. 124.

righted material in a library's collection under circumstances in which no new publication, new edition, sale, or other public use of the material occurs. The failure of the Petitioner to make this distinction invalidates much of his reasoning.

A library exists to permit its patrons to use its books and periodicals, whether copyrighted or not. When a patron reads a copyrighted article in a periodical, he is making exactly the personal use of that article which was intended by the author in writing it, the publisher in printing it, and the library in subscribing to the journal which contains it. The reader can show it to a fellow reader, or discuss it with other readers, or memorize it. It has also always been understood that he can copy it for his private use as a reader, student, scholar, or researcher without in any way infringing the author's copyright. Such use fulfills one of the principal functions of a library and it does not constitute publication because it is neither a publishing activity nor any other form of public use prohibited by the statute. Just as a scholar or other reader has always been considered to have a right to make a single copy of copyrighted material for his own personal use, he also has the right to request that a library make the copy for him. The library may prefer to make a copy if only to be certain that the original is not damaged in the copying process. Libraries have followed the practice for many years of providing such copies; such a copy serves as a substitute for lending the copyrighted material itself.

In the present case the users of copyrighted material were professional persons requiring the material for use in medical research work or patient care at the National

Institutes of Health or, in one instance, at an Army hospital in Japan. The right to make a single copy for personal use is important, however, to a wide variety of scholars and other library users, such as a high school senior who wishes a copy of an article in the back issue of a magazine for use in a debate, a professor selecting material for use in preparing lectures or in writing a book who cannot organize and file the material except as written notes or in photocopy form, or a private physician who, in caring for a patient, needs immediate access to an article which appeared at one time in a medical journal.

Since the right to make (or have made) a single copy of a copyrighted material for the personal use of a scholar or other reader has never previously been challenged, the courts have not had the occasion to address themselves to the legal basis for this right. The amici here suggest that both the history of U.S. copyright legislation and the concept of "fair use" show that the provisions of copyright law and the needs of scholars are compatible. We also suggest, however, that there are more limited grounds on which the present case can be decided without reaching the broader questions with which we are principally concerned. For example, the Petitioner has not proved that it is the owner of the copyrighted works which it alleges have been infringed or, more narrowly, that any rights it has derived from the authors of these works include a right to prevent the copying here at issue.

The Petitioner's concern that new technology will supplant traditional journal subscriptions (Pet. Br. 40-41) is unsupported by evidence of record and is not

relevant to the case before the Court. The ability of libraries to perform their traditional services, however, is at issue. Consider the photocopying for which the Petitioner seeks compensation. The article which is the subject of Count I was published in MEDICINE in November 1965 (Finding 4, C. App. 72), and the requests for copies were made in September and October 1967 (Finding 6(b), C. App. 75.) It can hardly be suggested that, if the physicians involved in this count had a need to subscribe to MEDICINE on a current basis to keep up with progress in their professional field, this need would be met by requesting a copy of an article nearly two years old. In every other count in the complaint the article requested was *more than* two years old. (Finding 4, C. App. 72; Finding 6(b), C. App. 75.) The same publication is also involved in Count VIII. In that case one of the requesters was a doctor assigned to an Army hospital in Japan who in January 1968 needed to refer to an article on *Occlusion of the Hepatic Veins in Man* which appeared in MEDICINE in December 1959. (*Id.*) It can hardly be suggested that, but for the photocopying service provided by the National Library of Medicine, the doctor in question would not only have to have been a subscriber to MEDICINE since 1959, but would also have to have carried his private collection of back issues of MEDICINE around the world with him, not to mention all the other medical journals to which he might have to refer in the future.

The case before this Court concerns only instances of copying articles in back issues of medical journals, the copying having been carried out in accordance with

restrictive rules on photocopying established by NIH (Findings 16-18, C. App. 80-81) and NLM (Findings 22-24, C. App. 84-88.) No infringement of copyright has occurred. First, such copying is essential to effective medical research, and the clause of the Constitution which deals with copyright authorizes only such protection of authors as will "promote the Progress of Science and useful Arts". Nor would reversal of the Court of Claims decision be justified by the terms of the Copyright Act itself because the reference in Section 1 of that Act to an "exclusive right" to "copy" was never intended to preclude the copying covered by the present complaint. This has been the clear understanding of the law since it was enacted, and not until this case was filed has any publisher or other copyright holder challenged the well-known practice of libraries in making single copies of materials for readers as a means of providing ordinary and necessary access to the libraries' collections. Even if this single-copy practice were to be viewed as a technical violation of copyright under the 1909 Act, this would not justify a holding for the plaintiff because the copying charged in the complaint would be within the scope of the recognized defense of "fair use".

A holding for the Petitioner here would be particularly unjustified because, from that point of view of the original authors of the articles in question, the publisher's effort to control the copying of articles in back issues of medical journals is wholly contrary to established practices and to the authors' own intense interest in the circulation of knowledge and the promotion of science. (*See, e.g.*, Finding 10, C. App.

77-78.) Reversal of the Court of Claims decision would seriously interfere with well-established procedures of scholarship and research without any significant benefit to the Petitioner for whom the sale of copies of journal articles has never been a substantial source of income (Findings 38, 39, C. App. 93-94) and with great detriment to both the authors of the material in question and to the users of the material and the public.

II.

THE CONSTITUTIONAL POLICY UNDERLYING THE LIMITED EXCLUSIVE RIGHTS GRANTED TO AUTHORS AND INVENTORS REQUIRES THE RESULT REACHED BY THE COURT OF CLAIMS

The result reached by the Court of Claims is required by the Constitutional policy expressed in the clause by which Congress is empowered "To promote the Progress of Science and useful Arts, by securing, for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries".[12] As Congress recognized at the time it enacted the present Copyright Act in 1909,[13] any copyright law must be framed and must be interpreted in the light of the Constitutional purpose:

> "The object of all [copyright] legislation must be (1) to promote science and the useful arts; (2) by

[12]Art. I, §8.

[13]17 U.S.C. §1, *et seq.*

> securing for limited times to authors the exclusive right to their writings; (3) that the subjects which are to be secured are 'the writings of authors.' It will be seen, therefore, that the spirit of any act which Congress is authorized to pass must be one which will promote the progress of science and the useful arts, and unless it is designed to accomplish this result and is believed, in fact, to accomplish this result, it would be beyond the power of Congress."[14]

The Petitioner asserts that, once an article has been published in one of its medical journals, it has the right to control the copying of the article in any form and for any purpose. Recognition of such a right would not promote the progress of science and useful arts. It would also not promote the interests of the authors of the articles. As one of them testified during the trial in this case, "Research without communication is useless," not only in terms of making one's own results available but also in terms of "consulting the prior literature".[15]

The authors in this case received no monetary compensation for their articles. (Finding 10, C. App. 77.) In addition to the objective of receiving recognition from the scientific community for their profes-

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[14]H.R. REP. NO. 2222, 60th Cong., 2d Sess. 6-7 (1909). The Senate Committee adopted the House report. S. REP. NO. 1108, 60th Cong., 2d Sess. 1 (1909).

[15]Testimony of Dr. V.A. McKusick. (Tr. 666.) Dr. McKusick was one of the authors of an article on *The Genetic Mucopolysaccharidoses* which was published by Petitioner in the November 1965 issue of MEDICINE and photocopied by the NIH library in September and October 1967. (Finding 4, C. App. 72; Finding 6(b), C. App. 75.)

sional work, the purpose of publication was "to disseminate medical information for the public welfare". (*Id.*) To facilitate such dissemination authors of articles in medical journals themselves obtain reprints at the time of original publication for distribution, usually free of charge, to interested colleagues and others who may request copies. (Finding 11, C. App. 78.) To argue, as in the Petitioner's brief,[16] that the type of photocopying which is at issue in this case "will have the undesired result of discouraging creative efforts of authors. . ." (Pet. Br. 15) is to obscure completely the character of these authors and the nature of their interests. When the needs of these authors and the readers they are trying to reach and inform are put in proper focus, one must conclude, with the Court of Claims, that: "There is no doubt in our minds that medical science would be seriously hurt if such library photocopying were stopped."[17]

The argument is advanced, however, that "this lawsuit became necessary to prevent the destruction of Petitioner's copyrights and of its business. . ." (Pet. Br. 17). One need not debate whether the manner of dissemination of scientific information represented by Petitioner's journals is the only or the best method

[16]*See also* Brief for the Authors League of America, Inc. as amicus curiae 2: "This ruling [of the Court of Claims] could diminish or destroy the author's income from the medium which first disseminates his work . . . ." The Authors League is a national society of professional writers and dramatists.

[17]Williams & Wilkins Co. v. U.S., 487 F.2d 1345, 1356 (Ct. Cl. 1973); C. App. 19.

which is available to accomplish the desired result. The fact is that, on the basis of the record in the present case, it is impossible to conclude that the single-copy photocopying practices of libraries has endangered the continuation of such publications. As the Trial Judge put it, "There is no evidence to show whether any particular instance or instances of unauthorized photocopying of plaintiff's journals resulted in the loss of a particular form of revenue to plaintiff".[18] The majority of the Court was prepared to go further and concluded, more generally, that the "record simply does not show a serious adverse impact, either on plaintiff or on medical publishers generally, from the photocopying practices of the type of NIH and NLM".[19]

The Petitioner may be right that, in order to qualify for minimum statutory damages of $250 for each alleged infringement, "it was neither necessary nor appropriate for Petitioner to seek to establish damages in the traditional sense". (Pet. Br. 31.) But where the issue is whether single-copy photocopying of libraries serves "To promote the Progress of Science and useful Arts" or impedes such progress, the absence of a showing of damage to the copyright proprietor takes on an overriding significance.

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[18]Finding 39(b), second paragraph, App. 79. The Court retained this finding as the first sentence of its Finding 39(d), C. App. 94.

[19]487 F.2d at 1359; C. App. 23.

III.

THE STATUTORY PROVISIONS GOVERNING COPYRIGHT DO NOT AUTHORIZE AN AWARD OF COMPENSATION IN THIS CASE

The plaintiff in a copyright case must establish (1) that there has been an invasion of an "exclusive right" granted by Section 1 of the Copyright Act[20] and (2) that there has been an infringement for which a court should award damages. In the present case, the Court of Claims held that the defendant was "free of liability in the particular situation presented by this record".[21] In our view, that holding is correct, not only because a library does not invade any "exclusive right" created by Section 1 of the Copyright Act when, at the request of a reader, it makes a single copy of an article in a periodical, but also because such a single-copy practice is a reasonable and a customary use of material in a library's collection for which no damages should be awarded. In particular, the library does not invade any

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[20]Section 1 of the Copyright Act, 17 U.S.C. §1, provides in applicable part:

> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right: (a) to print, reprint, publish, copy, and vend the copyrighted work."

[21]487 F.2d at 1347; C. App. 3. In the usual case, the copyright proprietor is relying on Section 101 of the Copyright Act, 17 U.S.C. §101, which also provides for additional remedies, including an injunction. In the present case, the assertion of a right to "an award of reasonable compensation" is not based on Section 101, but, instead, on 28 U.S.C. §1498(b).

"exclusive right" to "copy". This conclusion is supported (1) by the history of § 1(a) of the Copyright Act of 1909 which suggests that the exclusive right to copy, as applied to books or journals, has reference only to copying in connection with "printing, reprinting, publishing and vending" the work; (2) the practices of the Library of Congress with respect to copying both before and after the enactment of the 1909 Act; and (3) the long-recognized exceptions to the "exclusive right" to copy where limited copying, for a variety of reasons, is considered justifiable.

A. A library does not invade any "exclusive right" created by Section 1 of the Copyright Act when, at the request of a reader, it makes a single copy of an article in a periodical.

1. Prior to the Copyright Act of 1909 mere copying of material in a book, without more, did not constitute an infringement of copyright.

As applied to books and periodicals the language in Section 1(a) of the present law is in a direct line of descent from Section 1 of the original Copyright Act of 1790.[22] That provision did not give an author of a

[22]Act of May 31, 1790. In the terminology of the seventeenth and eighteenth centuries, when copyright was evolving, the term "copy right" was used to refer to the privilege of printing and publishing an edition of a work and selling the copies so produced. *See* PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 4 (1968). (The word "copy" was also used, as a noun, to refer to the written manuscript from which the printer set up type.) In North America in the pre-Constitutional period, when the Continental Congress recommended that the several

book an exclusive right to copy his work. The First Congress merely provided that "the author and authors of any map, chart, book or books . . . shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books. . . ."[23] The section defining the "sole liberty" of the author was supplemented by a *separate* section which dealt with infringement,[24] but nothing in that section provided any protection against copying which did not

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States adopt laws to secure to authors of new books the copyright of such books, the word "copy" was treated as synonymous with the "exclusive right of printing, publishing and vending":

> "*Resolved*, That it be recommended to the several States, to secure to the authors or publishers of any new books not hitherto printed, being citizens of the United States, and to their executors, administrators and assigns, the copy right of such books for a certain time not less than fourteen years from the first publication; and to secure to the said authors, if they shall survive the term first mentioned, and to their executors, administrators and assigns, the copy right of such books another term of time not less than fourteen years, *such copy or exclusive right of printing, publishing and vending* the same, to be secured to the original authors, or publishers, their executors, administrators and assigns, by such laws nd under such restrictions as to the several States may seem proper."

LIBRARY OF CONGRESS COPYRIGHT OFFICE, COPYRIGHT ENACTMENTS 1 (1963). (Emphasis supplied.)

Bowker makes the same point in the first sentence of his treatise on COPYRIGHT: ITS HISTORY AND ITS LAW (1912) when he says, at page 1: "COPYRIGHT (from the Latin *copia*, plenty) means, in general, the right to copy, to make plenty. . . ."

[23] *Id.* §1.

[24] *Id.* §2.

involve printing, reprinting, publishing, or importing. It is clear that what the Congress had in mind was a "sole right" of the author (or his assignee) to publish and sell a printed edition of his work, including any reprinted edition.

When the copyright law was generally revised in 1831,[25] Congress continued to speak in terms of "the sole liberty of printing, reprinting, publishing and vending" books (and certain other works).[26] The infringement section relating to books used terminology which was similarly limited.[27] However, in the *separate* infringement section relating to prints, cuts, engravings, maps, charts, and musical compositions, Congress found it necessary to employ more complicated language to describe the normal process of producing copies of such works for public distribution and use. In this limited context Congress found it convenient to provide that, if any person shall "engrave, etch, or work, sell, or copy" such a work without consent, the offender would be subject to certain penalties.[28] However, although a reference to "copy" was thus introduced into the infringement provision applicable to prints, cuts, etc., parallel language was not used in the infringement section relating to books.

In 1870 the copyright law was again revised. As in the earlier law, *one* section was used to describe the author's "sole liberty"[29] and *later* sections dealt with

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[25]Act of Feb. 3, 1831, ch. 16, 4 Stat. 436.

[26]*Id.* §1, 4 Stat. at 436.

[27]*Id.* §6, 4 Stat. at 437-38.

[28]*Id.* §7, 4 Stat. at 438.

[29]Act of July 8, 1870, ch. 230, §86, 16 Stat. 212.

the subject of infringement. The section dealing with the author's 'sole liberty" was used to cover all types of works, and became quite complicated because it was expanded to cover a wide variety of such works – including engravings, cuts, statues, and models.[30] In this context the statement of the right of the author of a book – which had always been in terms of "printing, reprinting, publishing, and vending" – was combined with words more suitable to other media (including the word "copy"). Congress made it clear, however, that it did not intend these other words to apply to books by the way in which it framed the infringement sections of the law. The infringement section applicable to works *other than books* provided a remedy against any person who shall "engrave, etch, work, copy, print, publish, or import. . . ."[31] The infringement section applicable to *books,* on the other hand, provided a remedy only against a person who shall "print, publish, or import . . . ."[32] No remedy was provided against one who might "copy" a book.

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[30]The section of the Act of 1870 read as follows:

"SEC. 86. *And be it further enacted,* That any citizen of the United States, or resident therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, or of models or designs intended to be perfected as works of the fine arts, and his executors, administrators, or assigns, shall, upon complying with the provisions of this act, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same . . . ."

[31]Act of July 8, 1870, ch. 230, §100, 16 Stat. at 214.

[32]*Id.* §99.

In 1873, the infringement section on books became Section 4964 of the Revised Statutes and the infringement Section dealing with other works became section 4965.[33] Between 1873 and 1909, the copyright laws were amended a number of times,[34] but no change was made in this pattern. It continued not to be an infringement of copyright to "copy" a book, in the absence of printing, publishing, or vending.[35] The "sole liberty" section of the law continued to be used to

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[33]Act of December 1. 1873, Title 60 ("Patents, Trade-Marks, and Copyrights"), ch. 3, R.S. §§4964 and 4965, 18 Stat. 967-68. The "sole liberty" section became R.S. §4952, 18 Stat. 966.

[34]Act of March 3, 1891, ch. 565, 26 Stat. 1106; Act of March 2, 1895, ch. 194, 28 Stat. 965; Act of January 6, 1897, ch. 4, 29 Stat. 481; Act of January 7, 1904, ch. 2, 33 Stat. 4; and Act of March 3, 1905, ch. 1432, 33 Stat. 1000.

[35]This distinction was recognized and applied in Harper v. Shoppell, 26 Fed. 519 (C.C.S.D.N.Y. 1886). The defendant had acquired a copy of a cut used to print an illustration in *Harper's Weekly;* he made an electrotype plate from the cut and sold it to the *New York Illustrated Times* which then published the illustration. *Harper's* sued the maker of the cut, but, because they had not copyrighted the cut, the suit was brought for infringement of their publication. The court assumed the copyright on the publication covered all its contents, but held that copyright was not infringed because, although under Section 4965 of the Revised Statutes "copying" a cut would be an infringement (if the cut were copyrighted), Section 4964 provided no remedy against "copying" a book, the defendant not having engaged in printing or publishing the illustration. *Harper's* later moved for a new trial and secured a judgment on the theory that the defendant was liable for the printing and publishing of the illustration by *New York Illustrated Times* as a joint tort-feasor. Harper v. Shoppell, 28 Fed. 613 (C.C.S.D.N.Y. 1886).

cover all types of works and therefore continued to include a reference to "copying" to cover such works as paintings and statuary, but since no remedy was provided for infringement by the "copying" of a book, it continued to be clear that the "sole liberty" of the author of a book was intended to be limited, as it had always been, to "printing, reprinting, publishing, . . . and vending".[36]

2. Congress did not change this rule in 1909.

The history of the Copyright Act of 1909 demonstrates that the particular phraseology used in Section 1(a) was not intended to change the substance of the law on the protection of authors of books as it had existed since 1790.

The first point to be noted is that Congress continued to use the first section of the Act to describe the rights of authors, in general terms, while providing remedies for infringement of such rights in later provisions. Before 1909, as we have seen, "the sole right and liberty of printing, reprinting, publishing and vending" in the 1790 Act had been elaborated in order to encompass a variety of works other than books. Section 4952 of the Revised Statutes of 1873, for example, spoke of protecting "the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending. . .; and, in the case of

[36]For a decision holding that Section 4962 of the Revised Statutes, which consolidated earlier language, need not be applied in the same way to all types of works, *see* American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907).

a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others." This "sole liberty" belonged, as the case might be, to "the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts. . . ."[37]

Such language was hopelessly complex and, in 1904, in passing an act to give special protection to exhibitors of foreign works at the Louisiana Purchase Exposition, Congress referred instead to "the sole liberty of printing, reprinting, publishing, copying, and vending."[38] In this way the general term "copying" was introduced into the law as a substitute for the more cumbersome "completing, copying, executing, finishing" phraseology which had previously been used to provide coverage for such works as chromos, statutes, statuary, and other examples of the fine arts. It continued to be clear, however, that "copying" was *not* considered to relate to books. In 1905, when Congress added to the copyright law a new paragraph to provide a procedure for securing copyright protection for books in a foreign language first published outside the United States, the only exclusive rights referred to were "the sole liberty of printing, reprinting, publishing, vending, translating and dramatizing the said book. . . ."[39] Thus "copying"

[37]Act of Dec. 1, 1873, ch. 3, 18 Stat. 966.

[38]Act of Jan. 7, 1904, ch. 2, 33 Stat. 4.

[39]Act of March 3, 1905, ch. 1432, 33 Stat. 1000, *amending* R.S. §4952.

had been introduced into the law in 1904 as a useful generic term, but Congress in 1905 had made clear again that it did not recognize any exclusive right to "copy" a book.

In the 1909 Act the same drafting device was used: the traditional reference to an exclusive right to print, reprint, publish, and vend was used to cover the works (including books) for which such words were appropriate, and a reference to "copy" was included to cover other types of works where printing and reprinting is not involved. The final report of the House Patent Committee on the bill which became the 1909 Act went out of its way to make clear that, in this respect at least, the copyright law was not being changed:

> "Subsection (a) of section 1 adopts without change the phraseology of section 4952 of the Revised Statutes, and this, with the insertion of the word 'copy', practically adopts the phraseology of the first copyright act Congress ever passed – that of 1790. Many amendments of this were suggested, but the committee felt that it was safer to retain without change the old phraseology which has been so often construed by the courts."[40]

That the Congress had no intention or desire to limit the copying practices of libraries by its choice of words in Section 1(a) is evident from a detailed examination of the legislative history of the Copyright Act of 1909 from its first consideration in the 59th Congress in 1906 until its enactment on the last day of the Second Session of the 60th Congress in March 1909.

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[40]H.R. REP. NO. 2222, 60th Cong., 2d Sess. 4 (1909). The Senate Committee adopted the House Committee report. S. REP. NO. 1108, 60th Cong., 2d Sess. (1909).

The principal hearings on the revision of the copyright laws were held during the First Session of the 59th Congress in June and December 1906, before a joint committee of the House and Senate Committees on Patents. The bills before this joint committee (H.R. 19853 and S.6330) utilized the text of a bill drafted by the Register of Copyrights on the basis of conferences called in 1905 and 1906 by the Librarian of Congress, Dr. Herbert Putnam, following a Presidential message in December 1905 which urged that the copyright laws be revised.[41] The bill, which we will refer to as "H.R. 19853", was presented by Dr. Putnam at the opening of the public hearings in June 1906 as a bill "resulting from" the work of the conferences (although not a "conference bill" to which the participants in the conferences were committed). Throughout the consideration of the bill Dr. Putnam served as its leading proponent before the congressional committees.

As in the case of the bill which was ultimately enacted in 1909, the statement of the nature and extent of copyright was presented in the first section of H.R. 19853. The subsections of this Section 1 which applied to books (including periodicals) read as follows:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the copyright secured by this Act shall include the sole and exclusive right:
>
> (a) For the purposes set forth in subsection (b) hereof, to make any copy of any work or part thereof the subject of copyright under the provisions of this Act, or to abridge, adapt, or

[41] *See* GOLDMAN, THE HISTORY OF U.S.A. COPYRIGHT LAW REVISION 1901-1954, 1-2 (1955).

translate into another language or dialect any such work, or make any such version thereof;

(b) To sell, distribute, exhibit, or let for hire, or offer or keep for sale, distribution, exhibition, or hire, any copy of any such work; . . . ."[42]

This formulation stated the "exclusive right" of a copyright proprietor *not* in terms of the making of "any copy" of a work, but *only* in terms of the making of copies *for the purposes set forth in subsection (b)* – that is, for the purposes of sale, distribution or other commercial exploitation. Thus, it was announced at the outset that the object of granting copyright for books would remain the same as it had always been – to establish and protect the exclusive right to print, publish, and sell the copyrighted work. There is no evidence in the legislative history that this objective was ever altered as the bill made its way through the legislative process.

That Congress had no intention of impairing the rights of libraries to make use of the materials in their collections – but, on the contrary, wished to avoid any interference with those rights – is illustrated by the disposition made of an objection the libraries themselves offered to the original formulation of Section 1 of H.R. 19853 as we have quoted it above. That objection concerned Section 1(b) which dealt with many more types of works than just books and, as in the case of certain earlier provisions of copyright law, included words having no application to books. Section

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[42]LIBRARY OF CONGRESS, THE COPYRIGHT BILL: S. 6330, H.R. 19853, 59TH CONG., 1ST SESS., 9 (Copyright Office Bulletin No. 12 (1906)).

1(b) referred to an exclusive right "To sell, distribute, exhibit, or let for hire, or offer or keep for sale, distribution, exhibition, or hire any copy of such work." The libraries objected that this might interfere with their normal services (such as the circulation of books in their collections), and the House Committee on Patents deleted Section 1(b) on the basis of this objection. The Committee's Report explains the change:

> "It was insisted that this paragraph would prevent the purchaser of a copyrighted book from reselling it or lending it or giving it away or the letting for hire of any such book, thus putting an end to circulating libraries. Your committee believed that this section was susceptible of that construction and that under it a man might have only a qualified title to the copyrighted books in his library. This entire paragraph was eliminated, and in this bill the phraseology of the existing law has been substantially reproduced. . . ."[43]

Thus it is obvious that the congressional intent in drafting the provision which ultimately became Section 1(a) of the Act of 1909 was to protect the recognized rights of libraries to make use of the materials in their collections and in no way to impair those rights. Had the continuing use of the word "copy" in Section 1(a) been intended to effect a substantial change in the law in this respect, the committees of Congress would hardly have failed to make clear this intention and, if this had been the intention, the change would most certainly have been vigorously opposed by the Librarian of Congress, who played such a leading role in the formulation of the 1909 Act.

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[43]H.R. REP. NO. 7083, 59th Cong., 2d Sess. 8 (1907). The accompanying bill was numbered at that time H.R. 25133.

3. The copying practices followed by the Library of Congress prior to and following the passage of the 1909 Act support this interpretation.

We have noted above that it was the Librarian of Congress, Dr. Herbert Putnam, who spearheaded the preparation of the Copyright Act of 1909 and was the primary witness in the hearings on that legislation.[44]

In 1908 the Library of Congress published RULES AND PRACTICE GOVERNING THE USE AND ISSUE OF BOOKS. Those rules included the subject of the lending of books and, in addition, the alternative procedure of responding to requests for material through answers to correspondence. The list of "questions which the Library answers most willingly" included requests "(where of moderate extent) for an extract from a book in its possession."[45] The rules made clear that the restriction based on the "extent" of the request was related to limitations of time and expense and not to any supposed inhibition springing from laws of copyright because the next paragraph read as follows:

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[44]This Court recognized the significance of the role played by Dr. Putnam in the adoption of the 1909 Act in Mazer v. Stein, 347 U.S. 201, 213-214 (1954), where the successive copyright laws beginning with 1790, the legislative history of the 1909 Act (including Dr. Putnam's testimony), and subsequent practice in the Copyright Office were relied upon in concluding that the terms "works of art" and "reproductions of works of art" include mass-produced statuettes sold as lamp bases.

[45]LIBRARY OF CONGRESS, RULES AND PRACTICE GOVERNING THE USE AND ISSUE OF BOOKS 11 (1908).

> "Its ability to make extracts or to undertake research (other than purely bibliographic) is necessarily limited, and its usual course is to refer the inquirer to the sources and recommend to him a person to undertake the search or make the extract at his expense. . . ."[46]

Photocopying was available as a copying technique and was the subject of a separate section in the 1908 rules on the use of books:

> "*Photographing*. Photographing is freely permitted. The permission extends to the building itself and any of its parts, including the mural decorations. *It extends to articles bearing claim of copyright*, but the Library gives no assurance that the photograph may be reproduced or republished or placed on sale. These are matters to be settled with the owner of the copyright." (Emphasis added.)[47]

Thus the Library drew a distinction between (1) the making of a photograph of any copyrighted article, which it permitted, and (2) the further reproduction or republication or sale of the photograph, which were matters to be settled with the copyright owner. The Library did not take a position on the circumstances under which such further reproduction or republication or sale might require the owner's consent, but its rules made clear that it considered a user of the Library free

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[46] *Id.* at 11-12.

[47] *Id.* at 6. The policy expressed in this paragraph had been in effect at least since 1901 when it was described, in almost precisely these same words, in a section of the Report of the Librarian of Congress (Herbert Putnam) to the Congress for the fiscal year ending June 30, 1901. *See* REPORT OF THE LIBRARIAN OF CONGRESS 208 (1901).

to make a photograph of any copyrighted article in its collection.

In 1908, when the Library of Congress published RULES AND PRACTICE GOVERNING THE USE AND ISSUE OF BOOKS, the first section of the copyright bill awaiting final action by the Congress already expressed the "exclusive right" of the owner of a copyrighted work in terms of a "right to print, reprint, publish, copy, and sell" the work. If the Library had considered its 1908 copying practices to be inconsistent with an "exclusive right" to "copy" within the meaning of the pending bill, of which it was the primary proponent, it is unlikely that the 1908 rules relating to copying would have been issued in their original form.

We need not rely on indirect evidence, however, because *after the passage of the 1909 Act* the Library of Congress made clear that it considered its 1908 rules for the use of books to be entirely consistent with the new Act by continuing those same rules in force, through frequent new editions. The next edition of the Library's RULES AND PRACTICE GOVERNING THE USE AND ISSUE OF BOOKS which is available is dated 1913.[48] The Library continued to offer to make extracts "of moderate extent" from books in its collection or to refer inquirers to persons who might make extracts at the inquirer's expense.[49] The para-

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[48]LIBRARY OF CONGRESS, RULES AND PRACTICE GOVERNING THE USE AND ISSUE OF BOOKS (1913). We have been informed by the Library's staff that there was also a 1911 edition, but no copy of this publication has been located.

[49]*Id.* at 13-14.

graph on "photographing" copyrighted materials was continued unchanged.[50] Thus the government agency which had been most involved in the passage of the Copyright Act of 1909 did not consider that the language of Section 1(a) of that Act referring to an "exclusive right" to "copy" required any change in its copying practices. Indeed, in the 1913 edition of the rules on the use of books, the Library *expanded* its copying services. The section on "Photographing" in the 1913 RULES is immediately followed by one on "Photostat":

> "Photo-duplicates of books, newspapers, maps, etc., can be furnished at a reasonable rate by means of the photostat, installed in the Chief Clerk's Office. Apply to the Chief Clerk for a schedule of charges." [51]

Later editions of the Library's RULES AND PRACTICE GOVERNING THE USE AND ISSUE OF BOOKS were published in subsequent years, including 1918, 1921, 1929, 1932, and 1939. Throughout this period the copying services offered both prior to the passage of the 1909 Act and subsequent to the passage of the 1909 Act were continued. In 1939, thirty years after the Act was adopted, the Library continued to offer to make extracts from books,[52] to refer inqurers to persons who would make extracts,[53] to permit photographing of "articles bearing claim of copy-

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[50] *Id.* at 6.

[51] *Id.*

[52] *Id.* (1939) at 18.

[53] *Id.*

right,"[54] and to provide a photoduplication service.[55]

Dr. Herbert Putnam, the principal official involved in the drafting and passage of the Copyright Act of 1909, continued to serve as Librarian of Congress until 1939. When he was memorialized by the American Council of Learned Societies at the time of his retirement, one of the grounds on which he was extolled was the following:

> "You have led in adapting the most modern photographic processes to the needs of the scholar, and have . . . made widely available for the purposes of research copies of your own collections . . . ."[56]

It would be the height of irony if the Copyright Act of 1909 of which Dr. Putnam was the leading proponent were now held to provide a basis for preventing the effective use of library copying to serve research needs.

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[54] *Id.* at 6.

[55] *Id.* Through the years the description of this service was modified from time to time. The 1921 RULES at 6 read: "Photo-duplicates of certain classes of books, newspapers, manuscripts, maps, etc., in the Library collections, can be furnished, when required for work of a serious literary or scientific character, by means of the photostat, installed in the Chief Clerk's Office. Apply to the Chief Clerk for information as to charges, etc." The 1939 RULES at 6 stated: "The Library of Congress maintains a Photoduplication Service from which copies (on film or paper) of available materials may be obtained at a nominal cost. For information apply to the Chief Clerk."

[56] Address to Herbert Putnam, Librarian of Congress 1899-1939, American Council of Learned Societies (Washington, D.C., Jan. 27, 1939) second page of text.

The Court of Claims correctly refused to reinterpret Section 1(a) of the Copyright Act in a way which would defeat a major objective of one of its most prominent sponsors.

The Petitioner attempts to cast doubt on whether the Library of Congress still endorses the "single-copy" policy of earlier years by suggesting (Pet. Br. 10) that "the policy of the Library of Congress is that 'copyright material will ordinarily not be copied without the signed authorization of the copyright owner.'" As the Court below pointed out, however, the Library maintains photocopying machines for the use of readers and recognizes the right of readers to make a single photocopy of copyrighted material for the purpose of study, scholarship or research.[57]

4. Single-copy photocopying also does not infringe the exclusive right to "print, reprint, publish . . . and vend".

The Petitioner goes further than alleging infringement of an exclusive right to "copy" and argues that "the Government's operation of its photoduplication system amounts to the copying, printing, reprinting and publishing of petitioner's copyrighted journal articles." (Pet. Br. 49.) We deny that the making of a single photocopy by a reader or at the reader's request is "printing", "reprinting" or "publishing" as those terms are used in Section 1(a) of the Copyright Act.[58]

The Petitioner begins by asserting that "The words 'print, reprint, publish and copy' set forth in section

[57] *See* 487 F.2d at 1355, n. 16. C; App. 17.

[58] 17 U.S.C. § 1(a).

1(a) of the Copyright Law . . . mean what they say." (Pet. Br. 12.) This is a misquotation—and a Freudian slip. The words in Section 1(a) are "print, reprint, publish, copy *and vend*" (emphasis added) and it is entirely clear that, when Congress spoke of an "exclusive right" to "vend the copyrighted work," they *did not* mean what they said. Before 1909 it had been established, by judicial interpretation, that the owner of a copyright has no right to do more than to print and to sell, and having sold he cannot thereafter exercise any control over the particular copies, either as to the use which is to be made of them or the price at which they were to be sold.[59] As the principle is usually expressed, the exclusive right to vend is exhausted by the first sale.[60]

Since Congress did not mean what it said when it referred to an "exclusive right" to "vend" a copy-

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[59]*See* Bobbs-Merrill v. Straus, 210 U.S. 339 (1908). *See also* Harrison v. Maynard, Merrill & Co., 61 Fed. 689 (2d Cir. 1894) (resale of books salvaged from fire); Independent News Co. v. Williams, 293 F.2d 510, 515-17 (3d Cir. 1961) (resale of comic books); Ginn & Co. v. Apollo Publishing Co., 215 Fed. 772, 778 (E.D. Pa. 1914); *confirmed and modified*, 228 Fed. 214 (E.D. Pa. 1915) (dictum re acquisition by purchase of a copy of "right to resell it or to preserve and renovate it"). *Compare* National Geographic Soc. v. Classified Geographic, Inc., 27 F. Supp. 655 (D. Mass. 1939) (publication of collection of materials from second-hand magazine issues held infringing "compilation").

[60]*See e.g.*, 17 U.S.C. §27: ". . . nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained." Act of July 30, 1947, ch. 391, §1, 61 Stat. 652 (derived from 17 U.S.C. §41 (1946), Act of Mar. 4, 1909, ch. 320, §41, 35 Stat. 1084, without change).

righted work, it is essential to be cautious in interpreting the intended scope of the other elements of an author's exclusive right.

As we have pointed out earlier in this brief, the "exclusive right" to "print" and "reprint" a copyrighted work and the "exclusive right" to "publish" the work have been provided for in the copyright law since Congress first created a "sole right and liberty of printing, reprinting, publishing and vending . . . ."[61] There can be little doubt that when Congress spoke in 1790 of "printing" and "reprinting," it had the printing press in mind. While the decision of the Court of Claims suggests that "The photocopy process of NIH and NLM . . . does not even amount to printing or reprinting in the strict dictionary sense . . . ",[62] we have no doubt that the production of a *new edition* of a published work by any of several methods (including mimeographing[63] and photocopying) would invade the "exclusive right" created by Section 1(a) of the Copyright Act. Notwithstanding the foregoing, for the purpose of the present case, the point is that, while "printing or reprinting" may include "all mechanical reproduction of a number of copies, they would still

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[61] Act of May 31, 1790.

[62] 487 F.2d at 1351, C. App. 10-11.

[63] *See* Macmillan Co. v. King, 223 Fed. 862, 867 (D. Mass. 1914) holding typewriting or mimeographing to be "printing" within the meaning of Section 1(a) of the Copyright Act. *See also* the discussion of "the exclusive right to print and reprint" in 1 NIMMER, COPYRIGHT §102 (1973).

not cover the making of a single copy for an individual requester."[64]

The Petitioner wants this Court to hold that, if a new technology of photocopying is used to perform the function of "printing" as the Congress understood it in 1790 and 1909, it should be no less an invasion of the author's exclusive right because a more modern method is employed. The issue in this case, however, is whether the making of a single copy of a journal article for the use of a scholar or other reader, which was considered permissible before and after the passage of the Act of 1909, should be proscribed if it is accomplished by a technique not available around the turn of the century. In striking a reasonable balance between the rights of copyright proprietors and the rights of users of copyrighted works, there is no reason why the proprietors should insist that they receive all the benefits which arise from new means of making library collections more useful to scholars and other readers. Users of copyrighted materials are equally entitled to share in the progress of science and the useful arts.

We come finally to the contention that, when a library makes a single copy of a journal article at the request of a reader, it is violating an "exclusive right"

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[64]Williams & Wilkins v. U.S., 487 F.2d 1345, 1351, C. App. 11. *Compare* American Visuals Corp. v. Holland, 239 F.2d 740 (2d Cir. 1956) cited by Brief for The Authors League of America, Inc. as amicus curiae at 14, where 200 photostatic copies of pencilled artwork were made and disseminated. (The same brief also cites White v. Kimmell, 193 F.2d 744 (9th Cir. 1952); *cert. denied* 343 U.S. 957 (1952) at page 14, but this case dealt with the question whether certain manuscripts were in the public domain and not with the scope of the "exclusive right" created by Section 1(a) of the Copyright Act.

to "publish" the article. The argument is made that "the actual distribution of even one copy, constitutes 'publishing' under Section 1,"[65] but the cases which are cited for this proposition do not support it. Most of the decisions cited do not deal with single copies at all, and, where the effect of the "publication" of "one copy" is discussed, the context is whether an author has lost his common-law copyright by a "general publication" in the course of which he has failed to take the steps necessary to provide the basis for statutory copyright.[66] To the extent that a definition

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[65]Brief for The Authors League of America, Inc. as amicus curiae at 14.

[66]Of the three cases cited by The Authors League two are clearly not "single copy" cases. In American Visuals Corp. v. Holland, 239 F.2d 740 (2d Cir. 1956), the Court held that a dissemination of over 200 copies of a work containing a notice of copyright constituted "publication" which satisfied the requirements of 17 U.S.C. §10 so that the plaintiff was entitled to sue for infringement; in Macmillan Co. v. King, 223 Fed. 862, 867-868 (D. Mass. 1914), the distribution of outlines based on Professor Taussig's PRINCIPLES OF ECONOMICS to students in a number of classes was held to be a sufficient "publication" to support an action for infringement. The third case, Werckmeister v. American Lithographic Co., 134 Fed. 321 (2d Cir. 1904); *aff'd per curiam* 165 Fed. 426 (2d Cir. 1908); *aff'd* 221 U.S. 603 (1910) held that the exhibition of a painting in a gallery was not a "general publication" by which the painter had surrendered his commonlaw rights.

The Brief for the American Guild of Authors and Composers *et al.*, as amici curiae at 20-21, cites three additional cases. It refers to a dictum in Bobbs-Merrill Co. v. Straus, 147 Fed. 15, 19 (2d Cir. 1906); *aff'd* 210 U.S. 339 (1908) stating that "the common law right is lost by the general publication or unrestricted sale of a single copy." White v. Kimmell, 193 F.2d

of "publication" governs whether common law rights have been lost and whether statutory copyright has been achieved, the relevant provision of the Copyright Act is not included in Section 1(a), and, as the attorney for the Petitioner puts it,

> "One thing is universally agreed upon regarding the definition of ['publish'] or of 'publication' as used in this statute: it means different things in different places in the statute."[67]

Thus, in one of the cases cited by the Authors League, the court clearly differentiated between the right to multiply copies—which is the subject of Section 1(a)—and the possible loss of common law rights by the way in which the author has dealt with a single copy:

> ". . . in case of a book, ordinarily the sole practical benefit to the author is in the right to multiply copies. The exhibition or private circulation of the original or of printed copies is not a publication, unless it amount to a general offer to the public. The unrestricted offer of even a single copy to the public implies the surrender of the common-law right . . . ."[68]

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744 (9th Cir. 1952); *cert. denied* 343 U.S. 957 (1952) dealt with loss of common law copyright by putting as many as 200 copies of a manuscript into unrestricted circulation. The "publication" issue in Continental Casualty Co. v. Beardsley, 253 F.2d 702, 706-707 (2d Cir. 1958); *cert. denied* 358 U.S. 816 (1958) also related to the unrestricted distribution of multiple copies which resulted in the loss of common law copyright.

[67]Pet. Br. 48.

[68]Werckmeister v. American Lithographic Co., 134 Fed. 321, 325 (2d Cir. 1904); *aff'd per curiam* 165 Fed. 426 (2d Cir. 1908); *aff'd* 221 U.S. 603 (1910) relied on in Brief for The Authors League of America, Inc. as amicus curiae at 14.

That it is the *multiplication* of copies which is intended to be protected by statutory copyright has been stated by this Court on a number of occasions. Justice Day, for example, discussed "the nature of the property in copyright" in the following terms in *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 290-291 (1907):

> "A copyright, as the term imports, involves the right of publication and reproduction of works of art or literature. A copyright, as defined by Bouvier's Law Dictionary, Rawles' edition, volume 1, p. 436, is: 'The exclusive privilege secured according to certain legal forms, of printing, or otherwise multiplying, publishing, and vending copies of certain literary or artistic productions.' "[69]

And in *Bong v. Alfred S. Campbell Art Co.*, 214 U.S. 236, 247 (1909), Justice McKenna referred to the author's "right of printing, publishing, copying, etc.", and "this right of multiplication of copies." Where a new work is published, copies are multiplied. No such multiplication occurs when material in a library's collection is made available to an individual reader for the reader's own use by means of a photocopy made by the reader or by the library at the reader's request.

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[69] *See also*, Globe Newspaper Co. v. Walker, 210 U.S. 356, 362 (1908); Caliga v. Inter Ocean Newspaper Co., 215 U.S. 182, 188 (1909).

B. The single-copy practice is a reasonable and customary use of material in a library's collection and is not an infringement of copyright.

No one in this proceeding questions the principle that there are uses of a copyrighted work which will not be held by a court to be an infringement of copyright, this is true notwithstanding the fact that there is nothing in the Copyright Act which expressly provides for such an exception to the author's "exclusive right." The usual way in which this principle is expressed is in terms of the "doctrine of 'fair use'."[70] The Court of Claims found that the use made of the Petitioner's copyrighted materials in the present case was "fair" and therefore was not an infringement.[71] The Petitioner objects to this conclusion but, in doing so, relies upon criteria developed in a special category of "fair use" precedents in which the facts are wholly unlike the present case.

1. A use of copyrighted material which is a "fair use" is not an infringement.

Since the defense of "fair use" does not appear on the face of the Copyright Act of 1909, it is appropriate

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[70] *See* 487 F.2d at 1350, C. App. 8.

[71] 487 F.2d at 1362, C. App. 28. *See also* Finding 46, C. App. 103: "The current and recent practices of NIH and NLM as described in the foregoing findings constitute a fair use." The court relied on a number of criteria. *See, in particular*, Part III of the opinion, 487 F.2d at 1352-62, C. App. 11-28.

to begin by underscoring the point that the existence of the doctrine is not at issue (so that we are only concerned with whether the court below applied it properly to the facts in the present case).

To begin with, the Trial Judge recognized that the following would not be held to be infringements of copyright (and suggested that there were "probably many more [examples] which might come to mind on reflection" (App. 46)):

(1) To copy excerpts from literary works for purposes of criticism or review (App. 41);
(2) To copy portions of scholarly works (*Id.*)[72]
(3) for a library to photocopy for a patron a part of a book, or a part of a periodical article, such as a chart, graph, table, or the like (so long as the portion copied is not practically a substitute for the entire original work) (App. 45);
(4) for a library to replace damaged pages of copyrighted works in its collection with photocopies (App. 45-46);
(5) for a library to make a small number of photocopies for in-house administrative purposes, such as cutting up for cataloguing or the like (App. 46); and
(6) for a library to supply attorneys or courts with single photocopies for use in litigation (*Id.*).

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[72] *See also* App. 46, where the Trial Judge appears to approve (as "*de minimis*") the making of handwritten copies by scholars and other researchers of copyrighted works for use in research or other scholarly pursuits, provided the "entire" copyrighted work is not copied.

All the members of the court below accepted as valid these illustrations of acts which will not be held to be infringements of copyright, [73] and the majority opinion added the following somewhat different examples:

(7) to make a handwritten or typed copy for personal use;
(8) for individuals to make copies of poems, songs, or other items to be given, perhaps, to lovers and others;
(9) for a court to be given photocopies of recent decisions, with the publishing company's headnotes and arrangement, and sometimes its annotations;
(10) for a judge to make and give to a colleague a photocopy of a law review article, in one of the smaller or less available journals, which bears directly on a problem both judges are considering; and
(11) for one friend to make and send to another a photocopy of a particular item or article.[74]

Counsel for the Petitioner concedes that "the 'individual effort' and 'creative activities' to be encouraged by copyright . . . often require reference to another's material" and that, "in the course of such use, some copying necessarily takes place." (Pet. Br. 19.) He concedes, further, that, while this kind of copying may come within "the literal grant of exclusive rights" under the Copyright Act, it may be exempted from a charge of infringement on the basis of a rule of

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[73] The sections of the Trial Judge's opinion in which these illustrations were given were incorporated in Chief Judge Cowen's dissenting opinion. *See* 487 F.2d at 1377 and 1380-81, C. App. 53, 58-59.

[74] 487 F.2d at 1353, C. App. 13.

reason. (Pet. Br. 19-20.) [75] One need only consider the problems posed for the judge who has need of a law review article, the Congressman who needs a copy of a copyrighted article from the Library of Congress or, as here, the doctor in Japan who needs a medical journal article, to understand the reason for the development of a rule of reason which exempts from claim of copyright single-copy photocopying for personal use. The issue here thus can be stated as being whether such a rule of reason was properly applied by the Court of Claims.

2. The Petitioner erroneously seeks to limit the discussion of "fair use" to criteria which do not apply to the present case.

In concluding that the making of single copies of medical journal articles in the present case was a "fair use" of copyrighted material, the Court of Claims began with the premise that "a determination that a use is 'fair,' or 'unfair,' depends on an evaluation of the complex of individual and varying factors bearing upon the particular use. . . ." [76] The Petitioner's discussion of "fair use" however, focuses on only two factors and, within this narrow frame, deals with these factors only in terms of the manner in which courts have applied them in infringement cases where "the use in question

[75] During oral argument before the Court of Claims counsel for Petitioner was asked whether it would violate copyright if a judge asked his law clerk to photocopy a law review article for the judge's use in considering a case before him. At that time, it was the view of Petitioner's counsel that such act would constitute a technical violation of copyright. [Citation unavailable as no transcript of oral argument was made.]

[76] 487 F.2d at 1352, C. App. 11.

has been part of the interweaving of previously published material into another 'writing of an author'. . . ." (Pet. Br. 20.) Nothing of this sort occurred in the present case. No recipient of a photocopy of a journal article is alleged to have interwoven material from the copied article into a published article of his own. [77]

Accordingly, "fair use" precedents which deal with the problems of "plagiarism" or "piracy" have little relevance to the discussion. This is true of *Folsom v. Marsh*, 9 F. Cas. 343 (No. 4901) (C.C.D. Mass. 1841),[78] in which material originally published in a 12-volume compilation of George Washington's writings was included in a later two-volume published work on Washington,[79] of *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962), where a church choir director rearranged a copyrighted choral work and reproduced copies for a high school chorus and a church choir;[80] of *Benny v.*

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[77]Petitioner concedes this point: "The present case, of course, does not involve incorporation of materials into a new creation. . . ." (Pet. Br. 22.)

[78]See Pet. Br. 20-22; Brief for Association of American Publishers, Inc. *et al.* as amici curiae at 8; Brief for Associated Councils of the Arts as amicus curiae at 8; and Brief for American Guild of Authors and Composers *et al.* as amici curiae at 14.

[79]*Quaere* also whether Petitioner is correct in suggesting that the issue in Folsom v. Marsh was whether there had been a "fair and bona fide abridgement." (Pet. Br. 21.) *See* 9 F. Cas. at 347: "The defendants' work cannot properly be treated as an abridgement of that of the plaintiffs. . . ."

[80]Pet. Br. 23, 24; Brief for Magazine Publishers Association, Inc. as amicus curiae at 12.

Loew's Inc., 239 F.2d 532 (9th Cir. 1956); *aff'd sub nom. Columbia Broadcasting System, Inc. v. Loew's Inc.*, 356 U.S. 43 (1958); *rehearing denied* 356 U.S. 934 (1958), a television show "parody" case;[81] of *Public Affairs Associates, Inc. v. Rickover*, 284 F.2d 262 (D.C. Cir. 1960); *vacated and remanded with directions per curiam* 369 U.S. 111 (1962); *dismissal aff'd* 268 F. Supp. 444 (D.D.C. 1967) where the issue was whether the publication of a compilation of speeches made by Admiral Rickover was a violation of copyright;[82] and of *Rosemont Enterprises v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966); *cert. denied* 385 U.S. 1009 (1967) where defendant used in a published biography of Howard Hughes material taken from an earlier publication.[83]

"Fair use" tests developed in such cases have no application where copying is for the personal use of a scholar or other researcher who does not republish the material. We need not quarrel with Petitioner's suggestion that, if previously published material is "interwoven" into a new published work, it is a "fair use" only where "the material so used has been a reasonable portion of the copyrighted work."[84] That is not *this* case, and labored discussions of why the

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[81] *Id.*

[82] Pet. Br. 23-24.

[83] Pet. Br. 24-25; Brief for Magazine Publishers Association, Inc. as amicus curiae at 12.

[84] Pet. Br. 20.

copying of an "entire" article is not the copying of a "reasonable portion" of the article[85] are irrelevant.

Preoccupation with cases involving the borrowing by one author of material published by another has led Petitioner into a discussion of "whether the quoted portions might be used as a substitute for the original work," quoting from *Shapiro, Bernstein & Co. v. P. F. Collier & Son Co.*, 26 U.S.P.Q. 40, 42 (S.D.N.Y. 1934). (Pet. Br. 25.) But, again, the precedent cited is one dealing with the problem of copying in a published work. (In the *Shapiro* case excerpts from a popular song had been used in a serialized story in *Collier's*.) The significance of the phraseology quoted from the court's opinion is distorted when an effort is made to use it as a criterion in the present case. Moreover, the photocopies which NLM and the NIH supplied of articles in back issues of medical journals can be said to be "substitutes" for "the original" only in a very limited sense. "The original" was a bound volume of hundreds of pages. While there are occasions when

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[85] *See, e.g.*, Pet. Br. 22-25; Brief for Magazine Publishers Association, Inc, as amicus curiae, Section III.

It should be noted that this "entire work" argument also depends on a doubtful invocation of Section 3 of the Copyright Act, 17 U.S.C. §3 (Act of July 30, 1947, ch. 391, §1, 61 Stat. 652; Act of Oct. 31, 1951, ch. 655, §16(a), 65 Stat. 716). Section 3 provides that, when a copyright is secured on composite works or periodicals, the proprietor acquires the same rights he would have if he went through the mechanics of individually copyrighting individual articles or other component parts. This provision for the administrative convenience of copyright proprietors does not eliminate differences between the nature of periodical volumes, on the one hand, and individual articles on the other and should not foreclose an argument that what is a reasonable use may vary with the nature and length of the protected work.

having temporary access to such a bound volume fulfills a reader's needs, the loan (or sale) of a bound volume (or even an unbound journal issue) will frequently not do at all. As the Court of Claims points out, [86] a bound volume cannot be put into a filing cabinet. It cannot be shuffled with other notes. It cannot be given conveniently to a typist. It cannot be sent conveniently through the mail. Even a reprint, if clipped into a file, is more awkward to work with than a photocopy which has printing on only one side of the page. Thus a photocopy is not a substitute for an original but, particularly for the scholar or other researcher, an indispensable tool in using the original for some of the purposes for which it was intended. A library's function is to make its resources available to users. Providing a photocopy of an original for personal use merely facilitates carrying out the library's function and has no connotation of copyright infringement unless the material is subsequently republished in connection with a substantive exploitation of the work.

The legislative history of a recent amendment to another provision of the Copyright Act specifically recognizes a long-standing exception to copyright protection where copying is for personal use, unaccompanied by subsequent commercial exploitation. In connection with providing copyright protection for sound recordings, the House Judiciary Committee Report states:

> "In approving the creation of a limited copyright in sound recordings it is the intention of the

[86] 487 F.2d at 1353, n. 13, C. App. 13, citing J. Marke *et al.*, *Can Copyright Law Respond to the New Technology?*, 61 LAW LIB. J. 387, 407 (1968) (Remarks of V. Clapp.)

> Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years."[87]

The Committee thus specifically acknowledged the existence of limitations on other copyright proprietors' rights similar to the one which we suggest permits library single-copy photocopying for personal use.

Because of Petitioner's limited focus its brief does not refer to "fair use" considerations which are more directly relevant to the present case. "Implied consent" to a particular use, one such consideration, was one basis for the decision in *American Institute of Architects v. Fenichel*, 41 F. Supp. 146 (S.D.N.Y. 1941). It was there held that the making of six copies of a form published in a booklet dealing with architectural contracts was a "fair use."

The booklet was entitled STANDARD DOCUMENTS OF THE AMERICAN INSTITUTE OF ARCHITECTS. It was copyrighted by the Institute, and notice of copyright was given on the outside cover. The defendant made six copies of one of the forms and

[87]H. R. REP. 487, 92d Cong., 1st Sess. (1971) at 2 U.S. CONG. & ADMIN. NEWS, 1566, 1572 (1971).

delivered them to various persons with whom he was dealing, including contractors. The Institute sued for infringement. The District Judge granted a motion by the defendant for summary judgment, concluding that "The use made by the defendant of the plaintiff's book . . . comes under the head of fair use. . . ."[88] The court amplified its reasoning as follows:

1. When the plaintiff put on the general market a book of forms, "he implied the right to their private use."[89]
2. The words "print," "publish," "copy," and "vend" in Section 1 of the Copyright Act " 'are all clearly intended to be covered by the word "publish" ' " (quoting from Judge Learned Hand's decision in *Fitch v. Young*, 230 Fed. 743, 744 (S.D.N.Y. 1911), *aff'd per curiam*, 239 Fed. 1021 (2d Cir. 1917)), and "Publication means to issue copies to the public." Although "publication of a kind" took place when the defendant delivered the six copies of the form, there was in this act "no derogation of the plaintiff's copyright."[90]
3. Thus "the defendant's use was not the kind of use intended to be forbidden by the statute and does not constitute an infringement."[91]

American Institute of Architects v. Fenichel is a clear holding that there can be no infringement of copyright unless there is "publication" in the sense that copies are "issued to the public." In addition, the making of copies for the private use of the copier (and those he

[88]41 F. Supp. at 147.

[89]*Id.*

[90]*Id.*

[91]*Id.* at 147-48

was dealing with) was held to be a "fair use" because it is in the nature of a book of forms that they are made available to the public for the purpose of practical application. The publication of such a book "implied the right" of a user of the book to make copies of a form as the defendant did and deliver them to others as he did. In the same way, the publication of the scientific articles involved in the present case implied the right of subsequent copying of the articles for the personal use of an individual working in the same scientific field.[92]

3. The Court of Claims applied proper criteria and reached the correct conclusion.

The Court of Claims properly applied the "fair use" principle by considering a "complex" of factors, beginning with the fundamental consideration that the primary purpose of copyright protection is "To

[92]For another "fair use" case relying on "implied consent" to a particular use of copyrighted material see Karll v. Curtis Publishing Co., 39 F. Supp. 836 (E.D. Wis. 1941). The chorus of the "fight song" of the Green Bay Packers was used in a magazine article on the Packers. The court held that "when the plaintiff dedicated the song to the Green Bay Packers, by implication at least he consented to a reasonable use thereof associated with the Packers." *Id.* at 837. *See also* Kane v. Pennsylvania Broadcasting Co., 73 F. Supp. 307 (D. Pa. 1947), where the defendant had reprinted individual "first facts" taken from copyrighted books listing such items. In holding this not to be an infringement the court observed that "it would almost seem as though the plaintiff's books were intended to be used in some manner similar to that in which the defendant has used them." *Id.* at 308.

promote the Progress of Science and the useful Arts . . . ."[93] The majority below looked, in particular, at the nature of the material which was copied, quoting from the discussion of "fair use" in *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied* 385 U.S. 1009 (1967):

> "Whether the privilege may justifiably be applied to particular materials turns initially on the nature of the materials, e.g., whether their distribution would serve the public interest in the free dissemination of information and whether their preparation requires some use of prior materials dealing with the same subject matter. Consequently the privilege has been applied to works in the fields of science, law, medicine, history and biography."[94]

Against this background the court weighed, on the one hand, the potential harm to the Petitioner from permitting a continuation of single-copy photocopying as practiced by the NLM and the NIH library[95] and, on the other hand, the needs of the users of the material. In this context the court noted, without discussing the "fair use" cases with which the Petitioner is preoccupied, that this is not a situation in which an

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[93]487 F.2d at 1352, C. App. 12. *See also id.* at 1362, C. App. 28, quoting Professor Benjamin Kaplan's comment that, in questions of copyright law, it is "fundamental that 'use' is not the same thing as 'infringement,' [and] that use short of infringement is to be encouraged . . . ." KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT (1967).

[94]487 F.2d at 1352-53, C. App. 12.

[95]The court took particular account of the "reasonably strict limitations" applied by both libraries. 487 F.2d at 1354-55, C. App. 15-16.

author has published material taken from a copyrighted work:

> "... the medical researchers who have asked these libraries for the photocopies are in this particular case (and ordinarily) scientific researchers and practitioners who need the articles for personal use in their scientific work and have no purpose to reduplicate them for sale or other general distribution .... On both sides–library and requester–scientific progress, untainted by any commercial gain from the reproduction, is the hallmark of the whole enterprise of duplication. There has been no attempt to misappropriate the work of earlier scientific writers for forbidden ends, but rather an effort to gain easier access to the material for study and research. This is important because it is settled that, in general, the law gives copying for scientific purposes a wide scope...."[96]

The court also took account of evidence that, "until quite recently, library photocopying was carried on with apparent general acceptance."[97] Petitioner responds that "Practices of libraries or others before the advent of current photocopying methods are irrelevant." (Pet. Br. 12.) It is difficult to understand why. Even the "fair use" cases selected by the Petitioner make clear that a use which is reasonable and "customary" is a "fair use."[98] The Petitioner's theory seems to be that, if methods for making use of copyrighted works improve, what was once fair ceases to be fair because

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[96]487 F.2d at 1354, C. App. 14-15.

[97]*Id.* at 1356, C. App. 18.

[98]*See e.g.* Shapiro, Bernstein & Co. v. P. F. Collier & Son Co., 26 U.S.P.Q. 40, 42 (S.D.N.Y. 1934).

improvements in technology belong to copyright proprietors and not to users.[99]

In the final analysis, while it considered a number of factors, the court below concluded that the use was "fair" because the importance of the use outweighed any demonstrated harm to the Petitioner:

> "This record simply does not show a serious adverse impact, either on plaintiff or on medical publishers generally, from the photocopying practices of the type of NIH and NLM. . . . "[100]

Because "this record . . . fails to show a significant detriment to plaintiff but does demonstrate injury to medical and scientific research if photocopying of this kind is held unlawful,"[101] the court's conclusion should be affirmed.

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[99] *See, e.g.*, Pet. Br. 18: " . . . alternative forms of exploitation in keeping with current technology come within the normal ambit of a copyright owner's rights." *Compare* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968); White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1 (1908).

[100] 487 F.2d at 1359, C. App. 24.

[101] *Id.* at 1362, C. App. 29.

IV.

FOR ADDITIONAL REASONS NOT RELIED ON BY THE COURT OF CLAIMS THE PETITIONER IS NOT ENTITLED TO PREVAIL

A. The proposal the Petitioner now advances for additional compensation for uses of copyrighted material after payment for the periodical is not authorized by the Copyright Act and would extend copyright beyond its proper bounds.

Petitioner's brief to this Court advances a thesis which, although it may have been implicit in the arguments presented to the court below, was not fully developed. Briefs of several amici elaborate the argument. It runs along this line:

1. "It is virtually impossible to add to the subscribers of [medical] journals."[102]
2. While the number of subscribers "remains static"[103] the costs of publication continually increase.

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[102] Pet. Br. 16. *But see* Finding 39(a), C. App. 93-94 to the effect that subscriptions to MEDICINE increased from 2,800 to 5,400 from 1959 to 1969; subscriptions to PHARMACOLOGICAL REVIEWS increased from 2,600 to 3,100 from 1964 to 1969; subscriptions to the JOURNAL OF IMMUNOLOGY increased from 2,600 to 4,700 from 1959 to 1969; and subscriptions to GASTROENTEROLOGY increased from 4,100 to 7,000 from 1959 to 1969.

[103] *Id. See also* Brief for Authors League of America, Inc. as amicus curiae at 8 referring to "static circulations."

3. Petitioner is therefore seeking "payments for use of its articles" over and above the original subscription price of its journals.[104]
4. New technology—in particular, xerography—permits uses of copyrighted materials which were not possible before and, therefore, provides the opportunity for "alternative forms of exploitation" of the original copyright.[105]
5. "[This] lawsuit was brought to achieve some legal recognition of the rights of publishers . . . " to secure additional payments over and above the original subscription price "so that dialogue [between publishers and librarians] would be possible with the objective of reasonable financial accommodation on both sides."[106]
6. The decision of the Court of Claims in this case has reinforced the "adamancy" of librarians in refusing to make the proposed additional payments for the use of materials in their collection.[107]
7. Congress is considering a copyright revision bill and, in that context, "All agree that convenient access to scientific materials should be en-

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[104] Pet. Br. 17.

[105] Pet. Br. 18. *See also* Brief for the Authors League of America, Inc. as amicus curiae at 2-3, referring to "the new single-copy medium created by improvements in reproduction technology." *See also* Brief for Associated Councils of the Arts as amicus curiae at 3: "Should libraries be permitted to employ modern technological methods to extend and exhance their tradition function of making works available to the public . . . ?"

[106] Pet. Br. 29. *See also* Brief for American Chemical Society as amicus curiae 16: "The petitioner . . . instituted this action in order to . . . broaden the financial support for the ever-increasing costs of privately published, scientific journals. . . . "

[107] *See* Pet. Br. 29.

couraged,"[108] but no legislation has been enacted.[109]

8. "Reversal [of the decision below] would afford a unique opportunity to produce a workable pilot arrangement—continuation of photocopying with the Court of Claims setting compensation [under 28 U.S.C. §1498(a)] which is reasonable under the circumstances."[110]

The brief for the Petitioner admits that this scenario is incomplete. It is incomplete because, when the present test case[111] was brought, it was expected to produce a rule which would apply to *non-governmental* libraries as well as to governmental libraries. Non-governmental libraries are not subject to suit in the Court of Claims. However, the Petitioner's brief suggests, perhaps with tongue in cheek, that the "guidelines" which would be established by an award of compensation in this case by the Court of Claims "would furnish significant assistance to librarians and publishers to cooperatively achieve their common goal."[112] The Petitioner concludes: "By exercising its

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[108] *See* Pet. Br. 27.

[109] "Congress has refused to legislate a reproduction licensing system . . . ." Brief for Authors League of America, Inc. as amicus curiae, 4. *See also* Pet. Br. at 26.

[110] Pet. Br. 29. *See also* Brief for Authors League of America, Inc. as amicus curiae 25: "The establishment of 'voluntary' licensing systems for library reproduction of journal articles . . . is inevitable if this Court reverses the decision below. . . ."

[111] *See* Pet. Br. 29.

[112] *Id.*

function in this case through an award of reasonable compensation, the Court of Claims would furnish an appropriate model for the fashioning of relief by other courts."[113]

When this point is reached, Petitioner and the amici supporting its position offer two somewhat different scripts for a final act. The brief for the Petitioner suggests that "other courts" can use as a model "judicial procedures for setting reasonable license

[113] *Id.* at 30. The relief which might be granted by other courts is discussed in the dissenting opinion of Judge Nichols, 487 F.2d at 1386-89, C. App. 66-71, where it is noted that injunctive relief is authorized by 17 U.S.C. §101(a) and §112, but that "courts can refuse to enjoin copyright infringements if they deem an injunction would be unconscionable." 487 F.2d at 1386, C. App. 67. Judge Nichols does not explain, however, how courts would be expected to deal with the fact that 17 U.S.C. §101(b) provides for minimum statutory damages of $250 even in the absence of actual damage. The Brief of the Petitioner attempts to finesse this problem by totally obscuring it. It is suggested that, if a "balancing of equities" in a suit against a private library "led the court to withhold an injunction, the infringement might be remedied with appropriate monetary relief." (Pet. Br. 30.) The case cited as an illustration—Edgar H. Wood Associates, Inc. v. Skene, 347 Mass. 351, 197 N.E.2d 886 (1964)—involved infringement of *common law* copyright in architectural plans. Since the suit was not based on 17 U.S.C. §101, the statutory minimum of $250 under the Copyright Act of 1909 did not apply. Two other cases are cited: Dun v. Lumbermen's Credit Association, 209 U.S. 20, 24 (1908), and Foster v. American Machine & Foundry Co., 492 F.2d 1317 (2d Cir. 1974), *petition for cert. filed*, 42 U.S.L.W. 3654 (U.S. May 28, 1974). The latter case is conceded to be a patent case and therefore is inapplicable. In *Dun* this Court remanded a copyright case for proof of actual damages, but the case was brought and decided before the 1909 Act established the $250 statutory minimum.

fees . . . under the antitrust laws . . . ," such as "Judicial rate-making for copyright royalties" under the ASCAP consent decree.[114] On the other hand, the Authors League proposes that "government libraries could provide reproduction service to private libraries with respect to articles of any publisher who refused to negotiate mutually acceptable licensing arrangements . . . ."[115]

This case should not, and need not, be used to send lower courts down paths which lead into any such quagmires. The Petitioner and its amici are reacting to fears, not facts, and the record before this Court does not justify and would not support any such judicial legislation.[116]

Petitioner's reasoning is particularly invalid in the assertion that a copyright proprietor has the right to

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[114] *See* Pet. Br. 30, n. 16.

[115] Brief for Authors League of America, Inc. as amicus curiae 25. *But compare* Pet. Br. 18, n. 12: "If at all possible, the government should not be involved in controlling the dissemination of scientific information."

[116] The Petitioner wanders far from the record in noting its ultimate nightmare "that a 'single copy' of a journal might some day be stationed in a single location, with images of articles transmitted electronically on demand nationwide." (Pet. Br. 40-41.) Nor do the similarly irrelevant fears expressed by the Petitioner concerning the recently formed Research Libraries Group (the Harvard, Yale, Columbia, New York Public Library consortium) (Pet. Br. 19) take account of the facts that (1) no quality research library could operate without subscribing to recognized basic research sources such as the journals involved in this case, and (2) economies in reducing duplication in certain esoteric and foreign language publications will permit expanded acquisitions in other areas.

derive additional rewards from "uses" of published materials after their original acquisition by a library. A copyright proprietor is not entitled to a fee when a book is loaned, even though this is a use which for some readers may serve as a substitute for the purchase of the book. The reason is that, when an author or a publisher sells a printed copy of the author's work, the use which may be made of that physical embodiment of the author's work is governed by principles which are independent of the author's right to prevent others from appropriating the substance of the writing itself. Once a copyright proprietor has put a copyrightable work in tangible form by making copies of it (by printing or other method), one who purchases or otherwise lawfully acquires such a physical copy is free to use the physical form of the work as he wishes. For example, in the case of the individual owner of a copy in book form, he is free to read it—and re-read it—and let his wife read it or lend it to a friend or sell it.

In the same way, a library is free to deal with a copy of a work in its collection by making it available to an unlimited number of readers for use on or off its premises. It is also free to make copyrighted material available to a reader by making or allowing the reader to make a copy of the material, by hand or by any other method. It has been said that "The most significant distinction between a patent and a copyright is that letters-patent give a monopoly to make, vend and use; while a copyright does not give an exclusive right to use."[117]

[117] BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY §11 at 49 (1944).

When a library makes a reasonable use for the benefit of its readers of works which it has acquired for its collection, and this use does not involve the reprinting, publishing, and sale of new editions of the copyrighted works, no action for infringement should lie. In addition, in the same way in which the rewards to a copyright owner from the exercise of the "exclusive right" to vend are "exhausted" by the first sale, a copyright proprietor which sells a subscription to a medical journal should not be awarded the right to collect royalties or other payments on top of the original subscription price when libraries later make a reasonable and necessary use of the journal in the course of providing normal services to their readers.

B. It was not established that the rights conferred on the Petitioner by the authors of the copied articles included the right to bring this suit.

The Court below assumed, without deciding, that the publisher was the owner of the copyright in the eight articles which had been copied and was entitled to bring the suit for infringement.[118] It is true that the copyright on the issues of the medical journals in which the articles appeared was registered in the name of the publisher, so that any suit for infringement would

[118] 487 F.2d at 1349, C. App. 7 and *Id.* n. 5:

"Defendant vigorously contests the publisher's claim to be the copyright 'proprietor' and its right to sue in this court. The argument is that the individual authors of the articles are the owners and they have not assigned their rights to plaintiff."

normally have to be filed in the name of the publisher,[119] but it does not follow that the publisher had an unrestricted right to bring a suit without the concurrence of the authors of the articles. No such concurrence was secured, and three of the authors testified on behalf of the defendant at the trial.

The Trial Judge solved this problem by relying on "long standing custom:"

> "Ordinarily, there is no written agreement entered into between plaintiff and the authors of submitted manuscripts with respect to ownership of articles stemming from the manuscripts. However, by longstanding custom and absent any written or oral agreement to the contrary, an author who submits a manuscript for publication in a medical or other scientific journal assigns to the owner of the journal (i) the author's proprietary rights in any article stemming from the manuscript, (ii) the right to secure statutory copyright in any such article, and (iii) the right to enforce the copyright under the Federal copyright laws." Finding 10(b), App. 64.

The Court deleted this finding without substituting a finding of its own.[120]

The Trial Judge's finding that it is understood that the publisher will obtain statutory copyright on a medical journal is directly refuted by the fact that, out of twenty-six medical journals published by the petitioner in conjunction with professional societies, the publisher obtains the copyright in its name on only thirteen.

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[119] *See* 2 NIMMER, COPYRIGHT §132 (1973).

[120] The dissent of Nichols, J. suggests that he would have retained the finding. 487 F.2d at 1388, C. App. 70-71.

(Finding 5(a), C. App. 73.) Moreover, even in these cases, the publisher may hold the copyright only "for the sake of convenience." (*See, e.g.*, Finding 5(b), C. App. 73-74 and Tr. 40.) The further conclusion that it is custom that "the copyright will be enforced by the copyright registrant"[121] only serves to muddy the waters. The evidence in this case showed quite clearly that it was wholly contrary to established custom, and contrary to the understanding of the authors of the articles which were copied, to treat that copying as copyright infringement and bring suit for compensation. To say that Williams & Wilkins was the proper plaintiff if any suit was to be brought does not determine that any suit should have been brought at all.

The Trial Judge relied on the following generalization:

> "In the absence of evidence to the contrary, the transfer by an author to a magazine publisher of a manuscript without restriction is deemed to carry with it all right, title, and interest, including all rights of copyright, therein."[122]

He cited as the source of this proposition a decision by the United States Court for the Northern District of Illinois,[123] but in fact the quotation came from an article by Professor Henn of Cornell dealing with commercial practices of magazine publishers.[124] In the

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[121] App. 33.

[122] App. 33.

[123] Best Medium Publishing Co. v. National Insider, Inc., 259 F. Supp. 433, 434 (N.D. Ill. 1966); *aff'd* 385 F.2d 384 (7th Cir. 1967); *cert. denied* 390 U.S. 955 (1968).

[124] Henn, *"Magazine Rights"–A Division of Indivisible Copyright*, 40 CORNELL L.Q. 411 (1955).

same article, Professor Henn pointed out that while there is indeed a traditional "theory of indivisible copyright,"[125] courts also recognize "equitable interests" in persons other than the holder of the legal title. This makes it possible to market and exploit separately various rights, such as "book rights," "serial rights," and "television rights."[126] Even in such a commercial context, therefore, the author and publisher may have various understandings which limit the rights of the publisher as the copyright proprietor. For example, the magazine publisher may hold the copyright "in trust for the author;"[127] the publisher's interest may be satisfied if his exclusive right to publish is protected during the period of time an issue of his magazine is on sale, or the author may be put in the position to arrange for or permit other uses of his work (by reassignment of rights to the author or by license).

That it is understood in the case of articles published in medical journals that the author's implied "assignment of rights" to the publisher is subject to implied limitations is clear from the findings made in this case.

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[125] This theory holds that "with respect to a particular work embodied in concrete form, or separable part of such work, there is, at any one time, in any particular jurisdiction, only a single incorporeal legal title or property known as the copyright, which encompasses all of the authorial rights recognized by the law of the particular jurisdiction with respect thereto." *Id.* at 417-418 (footnotes omitted).

[126] *Id.* at 421.

[127] "Practically all material published in magazines is handled in [this] way, and is later reassigned to the author on request. . ." NICHOLSON, A MANUAL OF COPYRIGHT PRACTICE 58 (1945).

It is the *author* of an article and not the publisher who provides for the distribution of reprints at the time of publication.[128] If a copy of an article is requested from the publisher, the request is referred to the author.[129] If the author's supply of reprints is exhausted, what the publisher offers to sell is *not a copy of the article* but a copy of the issue in which the article appeared. (*Id.*) A third party who wants to republish an article usually requests the permission not only of the publisher but also of the author. (*Id.*; *see also* Tr. 193, 276, 425-26.)

As the findings of the Court of Claims point out, "all reprints are distributed by authors within several months up to several years after publication" (*Id.*) It is after that point is reached that library photocopying of individual articles takes on a special importance. Such photocopying of out-of-print articles—and not the photocopying of *current* articles—is most directly at issue in the present case.

By custom libraries have made single copies of articles in back issues of periodicals in lieu of loaning the bound volumes and for the greater convenience of readers. One witness for the plaintiff testified that libraries have been making such photocopies for many years (Tr. 104); and another witness testified that the practice "goes all the way back to the beginning of the century, or even before the beginning of the century" (Tr. 837-38). The original authors have applauded the practice—both as authors and as readers—and, until the

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[128] A witness for the plaintiff estimated that the average number of reprints ordered by an author is 300 copies, which the author generally gives away. Tr. 88; Finding 11, C. App. 78.

[129] Finding 11, C. App. 78.

present suit was filed, no copyright proprietor objected. This pattern of custom and usage is more directly relevant to the decision in this case and more fully documented on the present record than the custom of the initial assignments of rights by authors to publishers on which the Trial Judge relied. The Petitioner should not have been permitted to use its technical status as the "copyright proprietor" to attack traditional and accepted library practices in direct opposition to the intentions and interests of the authors from whom all rights of copyright are derived.

Three authors of articles involved in this suit testified at the trial.[130] The attitude of such authors is illustrated by Dr. Victor A. McKusick, the author of over 300 papers on genetics (Tr. 63), and the leading author of one of the articles alleged to have been infringed. Dr. McKusick testified that the article "was written to disseminate information concerning the . . . particular area that I have been working in, and the findings and conclusions that I have arrived at as a result of the work [on genetic mucopolysaccharidoses]" (Tr. 664.)[131] He also testified that the

[130] Dr. McKusick, Tr. 661-708 (Count I); Dr. Starr, Tr. 708-18 (Count VI); and Dr. Banks, Tr. 893-923 (Count VII).

[131] *See*, to similar effect, the testimony of Dr. Starr (Tr. 713), coauthor of Exhibit No. 6 (*The Stability of Messenger Ribonucleic Acid in Antibody Synthesis* which appeared in Issue No. 2 (August 1965) of Volume 95 of JOURNAL OF IMMUNOLOGY at 254-61), and the testimony of Dr. Banks (Tr. 901-02), co-author of Exhibit No. 8 (*The Course of Non Specific Ulcerative Colitis: Review of Twenty Years Experience and Late Results*, which appeared in Issue No. 6 (June 1957) of Volume 32 of GASTROENTEROLOGY at 983-1012).

Petitioner had not paid him anything for the article: "It was a voluntary contribution to the journal, quite a different situation than if one is writing a book . . . " (Tr. 671.) On the other hand, the Petitioner was paid a substantial amount—an estimated $800—to include in the published article a colored illustration. (Tr. 668.)

Dr. McKusick testified that he had never had any conversations or writings with the publisher concerning copyright (Tr. 676.) The "Instructions to Authors" published in the issue of MEDICINE in which Dr. McKusick's article appeared made no reference to any "assignment" of copyright to the publisher.[132]

Information published by the Petitioner in the same issue of MEDICINE made clear, on the other hand, its complete disinterest, at the time, in any market for the publication beyond the initial distribution to subscribers. In a notice containing "Information for Subscribers"[133] the Petitioner indicated that it did not attempt to keep a stock of back issues. The notice warned that "Subscriptions should be renewed promptly in order to avoid a break in your series. The publishers cannot guarantee to supply back issues of

[132] *See* Exhibit No. 2, unnumbered page following title page. Except for a reference to securing written permission to cite another researcher's *unpublished* observations, the only mention of authors' rights comes near the end of the "Instructions" and says, "Permission to use illustrative material published previously must be obtained from the copyright holder *and* from the author." (Emphasis supplied.) What better demonstration could there be of the fact that the understandings between publisher and author do *not* transfer all rights and interests to the publisher to do with as he may choose?

[133] *Id.*, third unnumbered page following title page.

belated renewals." New subscriptions were entered to begin with the first issue of the current volume, but it was noted that issues of the current volume may "be out of print at the time the subscription order is received." Nothing anywhere in the issue indicated that a reader could obtain reprints of individual articles. One must conclude that, when, in the present case, a copy was made of Dr. McKusick's article several years after its original publication, the need for such a single copy of a single article in a single issue was one in which the Petitioner, as publisher of MEDICINE had displayed absolutely no interest. The custom of permitting such copying was well established. It limited the nature and extent of the rights conferred on the Petitioner by any "assignment" made by Dr. McKusick when he originally submitted the article for publication, and should have been held to bar the Petitioner from suing for infringement.

CONCLUSION

The purpose of copyright protection is "To promote the Progress of Science and the useful Arts". That purpose is fostered by the dissemination of information and the Court of Claims correctly interpreted the copyright laws in the light of the governing provision of the Constitution.

When a library makes published material in its collection available to an individual reader for the reader's own use by means of a photocopy made by the reader or at the reader's request, it is following a traditional "single-copy" practice which is a reasonable

and customary use of material in the library's collection and not an infringement of copyright. The statutory history of the word "copy" in § 1(a) of the Copyright Act makes clear that the term was not intended to apply to making a single copy of material from a book or periodical for personal use. Moreover, the remedy for infringement of copyright does not apply where, as here, the user is making "fair use" of copyrighted material.

New technology now makes such copying more efficient, but there is no reason why the benefits to be derived from that technology should be withheld from libraries and the users of their collections in an effort to create an additional source of income for publishers of professional journals. Although the Petitioner in this case professes not to want to interfere with the dissemination of knowledge, the precedent which would be established by a reversal of the decision of the Court of Claims would have precisely that effect. It would threaten to terminate one of the most basic functions performed by libraries. In the interest of scholarship and research such a threat should not be allowed to come about.

The result reached by the Court of Claims was correct. Its decision should be affirmed.

Respectfully submitted,

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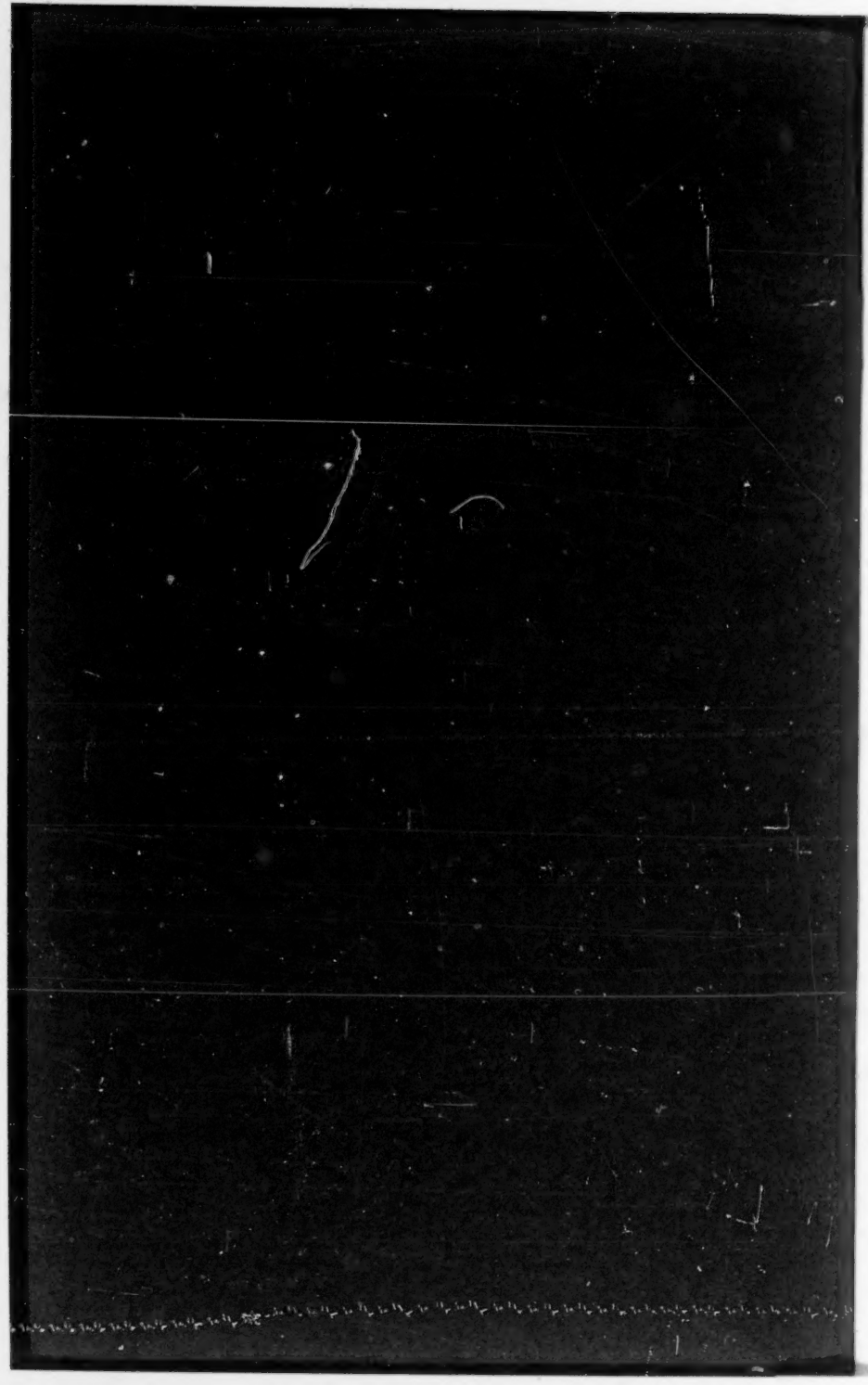

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statement	2
Summary of argument	8
Argument	11
The NIH and NLM programs make fair use of petitioner's journals and thus do not constitute copyright infringement	11
A. A "fair use" of copyrighted material is not an infringement of the copyright	12
B. The government's limited reproduction of medical articles here was a fair use	15
1. The special facts of this case indicate that this use is fair	16
2. The traditional factors indicate that the use is fair	22
a. The purpose of the use	22
b. The nature of the copyrighted works	23
c. The amount and substantiality of the material used	27
d. The effect of the use on the potential market for the articles	30
Conclusion	36

562-851—74——1

CITATIONS

Cases:

	Page
Berlin v. *E. C. Publications, Inc.*, 329 F. 2d 541	13–14
F. W. Woolworth Co. v. *Contemporary Arts, Inc.*, 344 U.S. 228	30
Folsom v. *Marsh*, 9 Fed. Cas. 342	28
Fortnightly Corp. v. *United Artists*, 392 U.S. 390	21
Goldstein v. *California*, 412 U.S. 546	16
Harper v. *Shoppell*, 26 Fed. 519	17
Henry Holt & Co. v. *Liggett & Myers Tobacco Co.*, 23 F. Supp. 302	23
Hill v. *Whalen & Martell, Inc.*, 220 Fed. 359	30
Kinelow Publishing Co., Inc. v. *Photography in Business, Inc.*, 270 F. Supp. 851	13
Leon v. *Pacific Telephone & Telegraph Co.*, 91 F. 2d 484	16
Loew's Inc. v. *Columbia Broadcasting System, Inc.*, 131 F. Supp. 165, affirmed *sub nom. Benny* v. *Loew's Inc.*, 239 F. 2d 532, affirmed *sub nom. Columbia Broadcasting System, Inc.* v. *Loew's Inc.*, 356 U.S. 43	16, 23–24, 28
Mazer v. *Stein*, 347 U.S. 201	12
Meeropol v. *Nizer*, 361 F. Supp. 1063	29
Morse v. *Fields*, 127 F. Supp. 63	12
New York Tribune, Inc. v. *Otis & Co.*, 39 F. Supp. 67	29
Public Affairs Associates, Inc. v. *Rickover, et al.*, 268 F. Supp. 444	29
Public Affairs Associates, Inc. v. *Rickover*, 284 F. 2d 262, vacated, 369 U.S. 111	16, 28–29
Rosemont Enterprises, Inc. v. *Random House, Inc.*, 366 F. 2d 303, certiorari denied, 385 U.S. 1009	14, 23, 30
Time Inc. v. *Bernard Geis Associates*, 293 F. Supp. 130	14

Cases—Continued

	Page
United States v. *Paramount Pictures*, 334 U.S. 131	12
Wihtol v. *Crow*, 309 F. 2d 777	19, 29

Constitution and statutes:

Constitution of the United States, Art. I, Sec. 8, cl. 8	12
Sound Recording Act of 1971, Pub. L. 92–140, 85 Stat. 391	18
17 U.S.C. 1, *et seq.*	12
17 U.S.C. 1	13
17 U.S.C. 1(b)	29
17 U.S.C. 9	12
17 U.S.C. 101	13, 26
17 U.S.C. 107	19
17 U.S.C. 107(d)	19
28 U.S.C. 1498(b)	2, 13, 15, 27
35 U.S.C. 1, *et seq.*	12
42 U.S.C. 275	4
42 U.S.C. 276	4
42 U.S.C. 276(a)(4)	4

Miscellaneous:

A Report on Physician Manpower and Medical Education, American Medical Association, Chicago, Ill., June, 1971	31
Adams, *Programs of the National Library of Medicine*, Seminar on Information Storage, Retrieval and Dissemination, New York, Nov. 5, 1964	27
Ball, *Copyright and Literary Property*, 260 (1944)	14
Cohen, "Fair Use in the Law of Copyright," *ASCAP, Copyright Law Symposium* (No. 6, 1955)	21, 23
120 Cong. Rec. (daily ed.) S16167	34
64 *Gastroenterology* (1973), 1059	24–25
H. Rep. No. 2222, 60th Cong., 2d Sess.	17

Miscellaneous—Continued

Page

H. Rep. No. 624, 86th Cong., 1st Sess. 15
H. Rep. No. 83, 90th Cong., 1st Sess. .. 14–15, 19, 26
H. Rep. No. 487, 92d Cong., 1st Sess. 19
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S. 1361, 93d Cong., 2d Sess. 34
Sec. 107 34
Sec. 108 34
Sec. 108(a) 34
Sec. 108(d) 34
Sec. 108(g) 34
S. Rep. No. 983, 93d Cong., 2d Sess. 34–35
Yankwich, *What is Fair Use*, 22 U. of Chic. L. Rev. 203 (1954) 24

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1279

WILLIAMS & WILKINS CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App.) is reported at 487 F. 2d 1345.

JURISDICTION

The judgment of the Court of Claims was entered on November 27, 1973. The petition for a writ of certiorari was filed on February 20, 1974, and was granted on May 28, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether respondent's libraries, in furnishing single photocopies of technical journal articles to their patrons, made a fair use of petitioner's copyrighted journals, and thus did not infringe the copyrights.

STATEMENT

This is an action for copyright infringement brought by petitioner in the Court of Claims under 28 U.S.C. 1498(b). The petitioner is a publisher of medical journals; the respondent is the United States, acting through the Department of Health, Education, and Welfare, and, more particularly, the National Institutes of Health (NIH) and the National Library of Medicine (NLM).

The specific conduct of respondent alleged by petitioner to be copyright infringement is the practice of the libraries at NIH and NLM of furnishing to their users, upon written request, a single photocopy of a journal article. In the case of the NIH library, the users are employees of NIH.[1] NLM is a library's library—its users are other libraries. These user libraries ultimately forward the photocopies provided by NLM to the physicians and medical researchers who have requested them.

It is conceded that defendants made at least one photocopy of each of eight specified articles in four of petitioner's journals (*Medicine, Pharmacological Reviews, Journal of Immunology* and *Gastroenterology*).[2] These articles reported on work conducted by the authors—half of the articles noted that the work

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[1] Although the NIH library is open to the public, the photocopying service is available only to NIH employees (Pet. App. 80).

[2] The articles involved are identified at Pet. App. 72, and the dates of the photocopies and the requesters are given at Pet. App. 75.

was supported by NIH grants (Pet. App. 89).[3] Petitioner does not pay the authors of articles published in its medical journals (Pet. App. 77).[4] Three of the four journals in which the articles appeared are published by petitioner for the benefit of certain professional societies, which employ editorial boards to select and edit the articles. The society and petitioner share the profits of each of these magazines (Pet. App. 73, 77).[5]

Petitioner does not maintain a stock of reprints or back issues; when an article is published, the petitioner sells the author a number of reprints; the author customarily distributes them free on request while they last (Pet. App. 19, 78). Petitioner refers requests for articles which have appeared in its journals to the author; if the author cannot provide a reprint, petitioner will offer to sell a back copy if one is in stock, or will refer the requester to a licensed reprint house for a copy of the journal. As a last resort, petitioner refers requests to its licensee for making photocopies (Pet. App. 78).

The functions of NIH include the promotion of medical research and the improvement of biomedical communications. The research function of NIH is car-

[3] The federal government supported approximately two-thirds of all medical research in the country in 1970 (Pet. App. 79). Since 1965, the government has, as a condition of its grants, retained the right to photocopy any resulting publications (Pet. App. 90).

[4] Indeed, it is customary for authors to pay publishers of such journals "page charges" for publication of their works (Pet. App. 77). The author of one of the articles at issue paid petitioner $800, provided by an NIH grant, to include special photographs in his article (Tr. 668).

[5] Petitioner publishes *Medicine* for its own benefit, compensating the editor with a share in the profits (Pet. App. 73).

ried on either by its own employees or through grants. More than 12,000 employees work for various specialized institutes on the campus at Bethesda, Maryland; 2,000 have doctoral degrees (Pet. App. 78–79).[6]

The NIH library contains between 95,000 and 120,000 volumes of journals. It subscribes to more than 3,000 different journals, including all those published by petitioner (Pet. App. 79).[7] These subscriptions cost the library $85,000 in 1970.[8] In that year, the library filled 85,744 requests from employees for photocopies of individual articles from the journals in its collection, constituting about 930,000 pages, at an average cost to the government of about $1 per request (Pet. App. 80).

NLM was created in 1956 for the express purpose of disseminating medical information.[9] It maintains one of the world's largest collections of medical literature (Pet. App. 5, 83).[10] Its collection of medical ma-

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[6] The research conducted by NIH employees results in the publication of more than 2,000 technical and scientific journal articles each year (Tr. 229).

[7] Six hundred of these journals, including the four involved in this suit, are purchased in multiple copies (Pet. App. 79). One of the two copies of each of these four journals stays in the library for consultation there, the other circulates (Pet. App. 80).

[8] This figure has been increasing steadily and rapidly. For example, in 1964, only $38,000 was spent for such subscriptions (Tr. 594).

[9] 42 U.S.C. 275, 276. Among the purposes of the library is to: "make available, through loans, photographic or other copying procedures or otherwise, * * * materials in the Library * * *" (42 U.S.C. 276(a)(4)).

[10] The collection includes more than 400,000 volumes of medical journals.

terial is available without charge to physicians and other scientists all over the world through interlibrary loans of journal material and through direct loans of books (Pet. App. 84).[11] In addition, NLM publishes the *Index Medicus,* which abstracts the world's medical literature,[12] and a catalog which announces NLM acquisitions. NLM provides special bibliographic services, and conducts research into improved methods of library science and communication of medical information (Pet. App. 83–84; Tr. 452, 457).

NLM currently subscribes to more than 18,000 journals (Tr. 746), including all but one of the journals petitioner publishes.[13]

The library's budget for journal subscriptions in 1970 was $189,131; in that year, it filled 93,746 interlibrary loan requests by photocopying a journal article (Pet. App. 88).[14]

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[11] Journal materials are ordinarily supplied by photocopies of the requested article, but articles from generally available current periodicals are not provided (see *infra*, p. 6).

[12] Users of *Index Medicus* are advised that access to articles cited can be obtained first through reprints from the author or publisher, second, from medical libraries at local schools, hospitals, and medical societies, third, from special libraries maintained by professional associations, fourth, from regional medical libraries, and, as a last resort, from NLM through interlibrary loan.

[13] Four copies of each of the four journals involved in this suit are received by NLM (Tr. 746).

[14] NLM is a regional library, serving the mid-Atlantic region. The number of interlibrary loan requests has been decreasing since 1966, as other regional libraries began filling requests from their regions. Thus, although about 120,000 requests were filled in 1968, the number then fell steadily to the 1970 figure (Pet. App. 84, 85, 88–89).

502-851—74——2

The photocopy operations of the NIH library and NLM are conducted on similar basic principles. Each library has a policy designed both to prevent abuse of the library's facilities, and to protect the legitimate interests of copyright holders. Thus, NIH and NLM impose several restrictions in providing photocopies: (1) a written request must be submitted for each article, (2) only a single copy is furnished, (3) only a limited number of pages is furnished, ordinarily not more than 40 or 50, and (4) excessive copying from a single issue or a single volume of the journal is not permitted (Pet. App. 80–81, 84–85).[15]

In addition, in neither program is the primary effect the further dissemination of articles in current, generally available publications. The median age of articles from petitioner's journals photocopied by NIH is three years (Pl. Exh. 12, Tr. 158). NLM will not supply articles in generally available journals published within the preceding five years, except to government libraries (Pet. App. 85).

The policies governing the photocopy operations of both the NIH library and the NLM are derived in part from the General Interlibrary Loan Code (Pet. App. 87; Tr. 625, 839).[16] This Code, to which libraries

[15] The court found that these limitations were consistently imposed by the libraries, and that there was no evidence that they were evaded by the libraries' users (Pet. App. 15, 81, 85–86).

[16] Other government libraries have adopted similar policies (Pet. App. 103). Except in cases where the copyright holder has explicitly refused permission to copy any materials, Library of Congress procedures currently permit photocopying for research of non-current copyrighted technical journals in the library's collections in lieu of loaning the material. Ma-

generally subscribe, provides that libraries may fill requests for the loan of journal materials by providing photocopies (Pet. App. 87–88). The General Interlibrary Loan Code dates from 1952; its provisions are based on the 1935 "Gentlemen's Agreement," a series of letters between representatives of publishers and libraries in which library photocopying was recognized as a legitimate method of filling requests for the loan of journal materials (Pet. App. 95–97; Tr. 840). Photocopying by libraries has been an established practice for at least 50 years (Pet. App. 97–98).

The Court of Claims, three judges dissenting, concluded that the NIH and NLM photocopying programs constituted a fair use of copyrighted materials. In reaching this conclusion, it rejected the contrary recommendation of the Trial Judge, and found it unnecessary to pass on the government's contention that the authors of the articles, not petitioner, were the owners of the articles (Pet. App. 7).

The Court of Claims emphasized that its conclusion was based on the presence in this case of eight elements.[17] It noted that "probably the core of our

chines for photocopying provided to readers at the Library of Congress bear the notice that a single copy of copyrighted material may be made for purposes of research and study (Pet. App 17, note 16).

[17] "We do not have to, and do not, say that any particular component would be enough, either by itself or together with some of the others. Conversely, we do not have to, and do not, say that all the elements we mention are essential to a finding of 'fair use'. They all happen to be present here, and it is enough for this case to rule, as we do, that at least when all co-exist in combination a 'fair use' is made out" (Pet. App. 28).

evaluation" consisted of three propositions: (1) that plaintiff had not shown it was substantially harmed by the NIH and NLM practices; (2) that the court was convinced medicine and medical research would be harmed by a finding that these practices constituted infringement; and (3) that, absent legislative guidance, the court should not impose such a risk of harm on these fields (Pet. App. 14, 19–25).[18]

SUMMARY OF ARGUMENT

Although the Copyright Act grants an exclusive right to "print, reprint, publish, copy, and vend" a copyrighted work, that right is limited by the equitable doctrine of fair use. The doctrine is designed to permit reasonable use of copyrighted materials without the owner's consent, in order to further the primary purpose of the Copyright Act: the promotion of the development of science, art, and industry.

[18] The other elements identified by the court as indicating that the photocopying here challenged constituted a fair use of the materials were: (1) The total absence of any element of commercial gain to be derived from the reproduction, since these libraries are non-profit institutions, and the major users of the service are scientific researchers and practitioners who need the scientific materials involved for their work, and will not reduplicate them for sale or general distribution (Pet. App. 14–15); (2) Both libraries have reasonably strict limitations on the photocopying services provided, which effectively minimize potential harm to the copyright owner (Pet. App. 15–17); (3) The practice of library photocopying has long been accepted as appropriate (Pet. App. 17–19); (4) There is grave uncertainty that the prohibition on copying in the current copyright law extends to this practice, and the House Report on the proposed revision of that law indicates that library photocopying is a fair use in appropriate circumstances (Pet. App. 8–11, 23–27); and (5) The practice in foreign countries indicates that the library photocopying here is a fair use (Pet. App. 27–28).

In the usual case in which the fair use doctrine is involved, a portion of a copyrighted work is incorporated into a subsequent publication or performance of the work for profit. Here, in contrast, the copying is done to make the material available for personal non-commercial use in scientific research. The limited kind of copying here involved constitutes fair use.

The courts generally consider four factors in determining whether a particular use of copyrighted material is fair: (1) the purpose of the use; (2) the nature of the copyrighted work; (3) the extent of the copying involved; and (4) the economic effect of the copying on the copyright owner. Judged by these standards, the NIH and NLM photocopying at issue here was a fair use, and thus did not infringe the copyrights on petitioner's journals.

1. First, the purpose of the photocopying was solely to promote scientific progress. Neither the library nor the requesting scientist was attempting to benefit financially from the work of another. Instead, the aim of both was to facilitate access to information necessary for further research or better medical treatment.

2. The nature of the copyrighted work also supports the conclusion that the use here was fair. The copyrighted works were scientific and technical in nature and the copying was solely to advance these purposes. On the theory that the authors of such works intend that they are to be used by others in further research, reproduction for such use is generally considered fair.

There is more than an assumption of such an intention on the part of the authors of the works here

involved. Several of them testified that they favored respondent's photocopying practices, since they believed they were essential to effective research. Petitioner's willingness to license the photocopying of its journals does not justify ignoring the importance of that conclusion, nor does the decision below hamper the negotiation of voluntary licensing agreements between publishers and libraries. Indeed, the negotiation of such agreements is encouraged by the narrow decision below, since neither party to the negotiation can be sure of success in future cases with dissimilar facts.

3. Although entire copyrighted articles were reproduced, under the particular circumstances of this case the third factor, the substantiality of the material copied, does not require the rejection of the fair use defense. The amount of copying in relation to the total library holdings is minimal. It has never been held that the copying of an entire work is enough to make the defense of fair use unavailable. Instead, both accepted practices and analogous statutes indicate that copying of complete copyrighted works for personal use is accepted as a fair use. Moreover, the legislative history of proposed revisions of the Copyright Act reflects congressional understanding that the photocopying of entire copyrighted journal articles may be a fair use under existing law.

It is not significant that the library, rather than the researcher, performs the photocopying. So long as the library acts at his specific request to produce a single copy for his individual non-commercial use, the situation is functionally equivalent to the loan of

the original to the borrower and his reproduction of it.

4. Finally, the absence of economic damage to petitioner supports the conclusion that the photocopying here was a fair use. The demand for subscriptions to petitioner's journals has not been reduced by the photocopying of specific articles by NIH and NLM. Neither library will photocopy entire journals, and neither provides the service primarily with respect to current journals. Both programs thus serve the library function of providing occasional access to a greater quantity of material than any individual could possibly purchase and retain individually, rather than the magazine publisher's function of providing a current review of material in an area of specialized interest. Although petitioner alleges that photocopying in general damages its market for reprints, back issues and licensed photocopies, the record shows that it has not attempted to exploit these potential markets itself.

ARGUMENT

THE NIH AND NLM PROGRAMS MAKE FAIR USE OF PETITIONER'S JOURNALS AND THUS DO NOT CONSTITUTE COPYRIGHT INFRINGEMENT

The restricted reproduction by NIH and NLM of certain scientific articles from petitioner's magazines for the individual use of scientists and physicians falls within the doctrine of "fair use." Hence, it did not infringe any copyrights. The reproductions involved here are a recognized form of library loan, which is always fair use, and this conclusion is rein-

forced by analysis of the doctrine of fair use and the criteria that control its application.

A. A "FAIR USE" OF COPYRIGHTED MATERIAL IS NOT AN INFRINGEMENT OF THE COPYRIGHT

Unlike most forms of property, copyrights, though created by statute, derive from a specific power accorded to Congress by the Constitution. That power, moreover, specifies the objective for which it is to be used, and that objective has been held to imply the limitation upon copyrights as private property embodied in the fair use doctrine. This much is traditional learning.

The Constitution provides that Congress shall have the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Art. 1, Sec. 8, cl. 8. Under this grant of power, Congress has enacted both the patent [19] and copyright [20] statutes. The primary purpose of these statutes is to promote the public welfare; reward to the author or inventor is a secondary consideration. *Mazer* v. *Stein,* 347 U.S. 201; *United States* v. *Paramount Pictures,* 334 U.S. 131, 158.

The present Copyright Act, enacted in 1909, grants authors [21] certain exclusive rights [22] and provides rem-

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[19] 35 U.S.C. 1, *et seq.*

[20] 17 U.S.C. 1, *et seq.*

[21] The government contended below that the journal article authors are the owners of the articles here involved. Only the owner or author of an article may copyright it, 17 U.S.C. 9; the publisher's copyright on a periodical covers contributed articles therein only if the publisher owns them, *Morse* v. *Fields,* 127 F. Supp. 63 (S.D. N.Y.). There was no express

edies for infringement of these rights.[23] To ensure that enforcement of an author's exclusive rights does not subvert the constitutional purposes, however, the courts have evolved the doctrine of fair use. As stated in *Berlin* v. *E. C. Publications, Inc.*, 329 F. 2d 541, 543–544 (C.A. 2):

> In the words of Article 1, Section 8, of the Constitution, copyright protection is designed "To promote the Progress of Science and useful Arts," and the financial reward guaranteed to the copyright holder is but an incident of this general objective, rather than an end in itself.

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assignment to petitioner of the articles involved; it claimed the assignment resulted by implication from established custom. The record does not support this claim, and *Kinelow Publishing Co., Inc.* v. *Photography in Business, Inc.*, 270 F. Supp. 851 (S.D. N.Y.), suggests that no such custom exists. Because the Court of Claims found there was no infringement, it did not decide the ownership of the articles (Pet. App. 7). We assume, *arguendo*, in this brief that petitioner is the owner of the articles and thus the holder of the copyrights. If the Court concludes that the library practices here involved would constitute an infringement of a valid copyright, the case should be remanded to the Court of Claims for determination of the ownership of the articles.

[22] 17 U.S.C. 1. The briefs *amici curiae* of the Association of Research Libraries, *et al.* and the American Library Association argue that these exclusive rights do not include the right to prevent the making of single copies of printed material for personal use, and hence that, without regard to the doctrine of fair use, there was no copyright infringement here. See n. 26, *infra*. While we agree generally with this argument, we do not believe that it is necessary, in the context of this case, to decide this broader question involving the scope of the coverage of the Copyright Act, since, as the Court of Claims concluded, the photocopying at issue here was, in any event, not an infringing use.

[23] 17 U.S.C. 101; the remedies for infringement by the government are specified in 28 U.S.C. 1498(b).

> As a result, courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry.

See also *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 303 (C.A. 2), certiorari denied, 385 U.S. 1009; and *Time Inc.* v. *Bernard Geis Associates*, 293 F. Supp. 130 (S.D. N.Y.).

Thus, in order to further science and the useful arts, the doctrine recognizes the " 'privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner * * *' Ball, *Copyright and Literary Property*, 260 (1944)." *Rosemont Enterprises, Inc.* v. *Random House, Inc., supra*, 366 F. 2d at 306.

The doctrine is applied as its rationale dictates in each case, and has no sharp edges. As a recent report on a bill proposing a revision of the copyrighted laws noted:

> The judicial doctrine of fair use [is] one of the most important and well-established limitations on the exclusive rights of copyright owners. * * *
>
> * * * * *
>
> Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the

> question must be decided on its own facts. [H. Rep. No. 83, 90th Cong., 1st Sess., 29.]

The Court of Claims here proceeded in just that fashion, basing its conclusion of fair use upon the specific facts of this case and carefully refraining from announcing sweeping principles. The court emphasized that it was not making any determination that all photocopying by libraries or by the government was necessarily consistent with the copyright laws.[24] Instead, the court stated that its "holding is restricted to the type and context of use by NIH and NLM, as shown by this record. * * * [W]e do not pass on dissimilar systems or uses of copyrighted materials by other institutions or enterprises, or in other fields, or as applied to items other than journal articles, or with other significant variables" (Pet. App. 28–29).

B. THE GOVERNMENT'S LIMITED REPRODUCTION OF MEDICAL ARTICLES HERE WAS A FAIR USE

In the course of this traditionally case-by-case approach, the courts have developed criteria which guide them in applying the fair use concept; an examination both of the special facts of this case and of the accepted criteria shows that the doctrine applies here.

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[24] There is thus no inconsistency between this decision and the legislative history of 28 U.S.C. 1498(b) cited by petitioner (Br. 15). H. Rep. No. 624, 86th Cong., 1st Sess., 5, indicates only that photocopying by the government may in some circumstances constitute copyright infringement. In considering revisions of the Copyright Act, Congress has recognized that library photocopying can be a fair use. See Pet. App. 26–27; n. 53, *infra*.

1. The special facts of this case indicate that this use is fair

This case is very different from those in which the doctrine of fair use is ordinarily involved.[25] Here, there is no incorporation of a copyrighted work into a subsequent published (or publicly performed) work. In contrast, this case involves numerous instances of the single reproduction of a copyrighted work for the individual use of the requestor. We know of no decisions specifically considering whether such reproduction is a fair use; this may be because of a general assumption that it is.[26]

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[25] See, *e.g.*, *Loew's Inc.* v. *Columbia Broadcasting System, Inc.*, 131 F. Supp. 165 (S.D. Cal.), affirmed *sub nom. Benny* v. *Loew's Inc.*, 239 F. 2d 532 (C.A. 9), affirmed by an equally divided Court *sub nom. Columbia Broadcasting System, Inc.* v. *Loew's Inc.*, 356 U.S. 43; *Leon* v. *Pacific Telephone & Telegraph Co.*, 91 F. 2d 484 (C.A. 9); *Public Affairs Associates, Inc.* v. *Rickover*, 284 F. 2d 262 (C.A. D.C.), judgment vacated, 369 U.S. 111.

[26] The *amicus* briefs of the Association of Research Libraries and the American Library Association argue persuasively that the Copyright Act was never intended to cover the copying of printed works for private use (Research Libraries Brief, pp. 18–45; Library Association Brief, pp. 14–20).

This Court has implied it shares this view. See *Goldstein* v. *California*, 412 U.S. 546, 555:

> To accomplish its purpose, Congress may grant to authors the exclusive right to the fruits of their respective works. An author who possesses an unlimited copyright may preclude others from copying his creation *for commercial purposes* without permission. In other words, to encourage people to devote themselves to intellectual and artistic creation, Congress may guarantee to authors and inventors a reward in the form of control over the *sale or commercial use of copies of their works*. [Emphasis supplied.]

Prior to the 1909 Copyright Act, the exclusive rights granted to the author of a published work did not include the right to copy

The Court of Claims noted several examples of copying for personal use or exchange on a purely non-commercial basis which are generally recognized as non-infringing, including the exchange of copies of poems or newspaper items between friends, or the exchange of law review articles and recent decisions, complete with the publishing company's headnotes, between lawyers and judges in litigation and adjudication (Pet. App. 13). Moreover, the provision by libraries of photocopying machines for the use of their patrons is commonplace, and the practice of providing photocopies to library patrons dates from at

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the work. *Harper* v. *Shoppell*, 26 Fed. 519 (C. Ct., S.D. N.Y.). The 1909 Act reorganized the provisions of the prior law, but was not intended to expand its coverage (H. Rep. No. 2222, 60th Cong., 2d Sess., 4).

It was assumed, both before and after the enactment of the Copyright Act of 1909, that the exclusive rights of the copyright owner did not include the right to control the copying of the copyrighted material for personal use (Research Libraries Brief, *supra*, pp. 34–39). Although advancing technology has rendered it far easier to make copies of published materials, that does not justify expanding the statutory copyright protection to a situation it was never intended to cover; the legitimate users of copyrighted materials, no less than their producers, are entitled to benefit from advancing technology.

There is thus at least "a solid doubt whether and how far" the Copyright Act prohibits the copying of books and articles (Pet. App. 9). We do not, however, believe that the Court need decide, on the facts of this case, whether the Copyright Act protects copyright owners against photocopying in some circumstances. (In a case in which, for example, photocopying was the functional equivalent of publication, presumably there would be copyright infringement.) But the copying of material for private use may well be outside the scope of the Copyright Act *ab initio;* at least, the fact that the copy is made for personal use and not for commercial benefit is strong support for the conclusion that it is a non-infringing fair use.

least 1935, when the so-called "Gentlemen's Agreement"[27] explicitly recognized that provision of single copies for research is a fair use. The Agreement notes that:

> The statutes make no specific provision for a right of a research worker to make copies by hand or by typescript for his research notes, but a student has always been free to "copy" by hand; and mechanical reproductions from copyright material are presumably intended to take the place of hand transcriptions, and to be governed by the same principles governing hand transcription [Pet. App. 97].

Therefore, the agreement provided that:

> A library * * * owning books or periodical volumes in which copyright still subsists may make and deliver a single photographic reproduction * * * of a part thereof to a scholar representing in writing that he desires such reproduction in lieu of loan of such publication or in place of manual transcription and solely for the purposes of research * * * [Pet. App. 96].

Congress has also recognized that the reproduction of copyrighted works for personal non-commercial use is not a violation of the Copyright Act. In the Sound Recording Act of 1971, Pub. L. 92–140, 85 Stat. 391, Congress amended the Copyright Act to protect against unauthorized duplication of sound recordings. It recognized the widespread practice of the making of private recordings from copyrighted ones, and stated that it did not intend to limit the making of such recordings. The precise reason given for this decision was "the

[27] The "Gentlemen's Agreement" was signed by the Chairman of the Joint Committee on Materials for Research and the President of the National Association of Book Publishers (Pet. App. 96–97).

intention of the committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17." H. Rep. No. 487, 92d Cong., 1st Sess., 7.[28]

The private duplication of sound recordings, which Congress recognized to be a fair use, may well result in reducing the market for the copyrighted material. In addition, the purpose of most such private recording is purely for personal pleasure. *A fortiori*, the duplication by a researcher of a journal article for purposes of scientific study is a fair use.[29]

This conclusion is further supported by the discussion in the Judiciary Committee Report of the fair use provisions in the 1967 proposed revision of the Copyright Act. After emphasizing that these provisions were designed to reflect the existing law (H. Rep. No. 83, 90th Cong., 1st Sess., 31), the Report expressly recognized the propriety of reproducing a whole copyrighted article for classroom use (*id.* at 34–35):

> *Single copies of "entire" works.* In the various discussions of educational copying at the hearings and thereafter, a question that has never

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[28] Thus, the result in *Wihtol* v. *Crow*, 309 F. 2d 777 (C.A. 8), upon which petitioner relies, would presumably have been different if the copyrighted composition had simply been copied, and not arranged and performed publicly.

[29] A further indication that the private use of a single copy of a copyrighted work is a fair use is that 17 U.S.C. 107, which prohibits importation of unauthorized copies of books during the existence of the American copyright in such a book, nonetheless allows importation of single copies of such works "[w]hen imported, not more than one copy at one time, for individual use and not for sale * * *." 17 U.S.C. 107(d).

> been resolved involves the difference between an "entire work" and an "excerpt." The educators have sought a limited right for a teacher to make a single copy of an "entire" work for classroom purposes. The committee understands that this was not generally intended to extend beyond a "separately cognizable" or "self-contained" portion (for example, a single poem, story, or article) in a collective work, and that no privilege is sought to reproduce an entire collective work (for example, an encyclopedia volume, a periodical issue) or a sizable integrated work published as an entity (a novel, treatise, monograph, and so forth). With this limitation, and subject to the other relevant criteria, the requested privilege of making a single copy appears appropriately to be within the scope of fair use.

The Committee also indicated that this statement regarding fair use was generally applicable to all types of uses, stating (*id.* at 35):

> *Reproductions and uses for other purposes.*—The concentrated attention given the fair use provision in the context of classroom teaching activities should not obscure its application in other areas. The committee emphasizes again that the same general standards of fair use are applicable to all kinds of uses of copyrighted material, although the relative weight to be given them will differ from case to case.

The congressional understanding, as well as the longstanding library custom, is that the making of a single copy of an entire article for private use is a fair use, even if the copy is made purely for personal

pleasure.[30] The rule perforce applies to the making of copies of material borrowed from research libraries. If scholars are prohibited from copying copyrighted articles for their own use, either by hand directly by means of notes, or by photocopying, then the fundamental purpose of the research library is imperiled.

There is no reason why the result should be different if the library, rather than the researcher, operates the photocopying machine, or if the researcher is not physically present when the copy is made. So long as the copy is made at the specific request of the researcher, and for his own individual, non-commercial use, the practice is virtually identical with the loan of the material and its subsequent copying by the recipient. It is, in any event, far closer to that situation than to the one in which copyrighted material is incorporated into a competing work.[31]

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[30] "Anyone may copy copyrighted materials for purposes of private study and review." Cohen, "Fair Use in the Law of Copyright," *ASCAP, Copyright Law Symposium* (No. 6, 1955), 43, 58.

[31] Cf. *Fortnightly Corp.* v. *United Artists*, 392 U.S. 390, where this Court concluded that a CATV system does not infringe the copyright owner's exclusive right to perform his works. The Court noted that the CATV system simply enhanced the viewer's capacity to receive TV programs. The viewer himself could have similarly enhanced his capacity to receive TV programs by constructing a powerful antenna system himself, or jointly with other users. The fact that the CATV system was erected, owned, and operated by third parties did not affect its nature as part of the viewing, rather than the broadcasting function. *Id.* at 398–400. Similarly, here the libraries' photocopying is designed to facilitate the reader's ability to use the published journals, in substitution for copying by each reader individually. Functionally, it makes no more difference that the copying is not performed personally

2. The traditional factors indicate that the use is fair

Courts generally consider four factors in determining whether a particular use of copyrighted material is "fair": (1) the purpose of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the material used in relation to the copyrighted work as a whole; and (4) the effect of the use on the copyright owner's potential market for his work.[32] These factors are guides to analysis, not absolute standards. Moreover, although the factors may be analytically isolated, the result turns on the total impact of all four criteria; "generally no single factor will determine whether a use is fair or unfair." A. Latman, Fair Use of Copyrighted Works, Copyright Law Revision Study No. 14, 86th Cong., 2d Sess., 13.

Each factor points to a conclusion of fair use here. That conclusion is further buttressed by the strong social policy which favors the finding of fair use in this case.

a. *The purpose of the use.* Here the sole objective of the use is the advancement of medical knowledge. The libraries involved are nonprofit institutions devoted entirely to furthering the progress of science in the field of medicine. The requesters are physicians

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by the ultimate beneficiary than it did that the viewer did not own the CATV system. Indeed, the case for non-infringement is even stronger here, since the CATV system is operated for profit whereas the libraries' photocopying is done to aid scientific research.

[32] Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, Committee on the Judiciary, U.S. House of Representatives, 87th Cong., 1st Sess., p. 24.

who use the information contained in the articles for further research or for the treatment of patients, not for direct financial gain by resale or similar means. As the opinion of the court of claims indicates: "On both sides—library and requester—scientific progress, untainted by any commercial gain from the reproduction, is the hallmark of the whole enterprise of duplication. There has been no attempt to misappropriate the work of earlier scientific writers for forbidden ends, but rather an effort to gain easier access to the material for study and research" (Pet. App. 14–15).

b. *The nature of the copyrighted works.* The copyrighted works are purely scientific; the articles are written in order to disseminate specialized scientific information, not for commercial gain.[33]

Both the commentators and the courts have recognized that the case for fair use is strongest and most extensive where science and the arts are involved. Cohen, "Fair Use in the Law of Copyright," *ASCAP, Copyright Law Symposium* (No. 6, 1955), 43, 67; *Rosemont Enterprises, Inc.* v. *Random House, Inc., supra; Henry Holt & Co.* v. *Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa.). Cf. *Loew's Inc.* v. *Columbia Broadcasting System, Inc., supra,* where the district court noted, in finding that Jack Benny's parody of "Gaslight" infringed the copyright (131 F. Supp. at 175):

> * * * the factor of use for commercial gain has been considered by the courts in connection with most, if not all, infringements of copy-

[33] See note 4, *supra.*

> righted material, regardless of the particular subdivision of Sec 1, Title 17 U.S.C.A., which is invoked. Thus, in the field of science and the fine arts, we find a broad scope given to fair use. "This doctrine permits a writer of scientific, legal, medical and similar books or articles of learning to use even the identical words of earlier books or writings dealing with the same subject matter." *Thompson* v. *Gernsback*, D.C. N.Y. 1950, 94 F. Supp, 453, 454. The writer of such works "invites reviews, comments and criticism" [citing Yankwich, *What is Fair Use*, 22 U. of Chic. L. Rev. 203 (1954)] and we could add, the *use* of the books and portions and quotations therefrom for the purpose of the advancement of learning. He does not invite or consent to its use for commercial gain alone.

A liberal application of the fair use doctrine is essential with respect to scientific works precisely because unless these works are disseminated, absorbed and commented upon, their purpose will not be served.[34] For this reason, the authors of the subject articles themselves favored the photocopying of their articles by respondent's libraries; they considered such photocopying essential to the efficient conduct of medical research (Pet. App. 23; Tr. 664, 669–671, 682, 713–715, 896, 901–902).[35]

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[34] The importance of the dissemination of these works is reflected in NLM's decision to provide, on request, photocopies of articles in recent journals which are not widely available.

[35] Moreover, the Governing Board of the American Gastroenterological Association and the Editorial Board of *Gastroenterology*, members of the association who select articles for the journal, "believe that the use of copyright as a basis for restriction of photocopying would impede the free flow of scien-

Petitioner disagrees. It contends that medical research will be better served by a holding that any library photocopying infringes the copyright, since it is willing to license the photocopying. It further contends that the decision below will make libraries unwilling to enter into voluntary agreements to recompense publishers for photocopying, and thus will injure medical research by rendering the publication of medical journals financially impossible (Pet. Br. 16, 27). But petitioner's willingness to license use of its journals cannot affect, because it begs, the legal question, which is whether a license is required. That question turns on whether the photocopying here involved is a fair use, considering, *inter alia,* its importance to medical research.[36]

Nor will the effect of the decision below be to discourage the negotiation of voluntary agreements.[37] By carefully circumscribing its decision, and warning that it was not reaching any conclusion concerning the propriety of other types of library photocopying, the court below encouraged the negotiation of voluntary licensing agreements between libraries

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tific information in our field, to which our Association is specifically dedicated." 64 *Gastroenterology* (1973), 1059.

[36] Petitioner's willingness is no assurance that the publishers of the thousands of other journals to which NIH and NLM subscribe will be of like mind.

[37] Indeed, there has been no such effect even upon the parties to the instant case. Since the initiation of this suit, petitioner has adopted the Court of Claims' suggestion (Pet. App. 25, n. 26) and now charges a higher institutional subscription rate to entities which engage regularly in photocopying. Both NIH and NLM currently pay this rate. 64 *Gastroenterology* (1973), 1059.

and publishers. Since the status of other photocopying programs remains unclear, both the libraries and the publishers can be expected to resolve their differences through negotiation, rather than running the risks of litigation.[38] The decision below thus is consistent with the congressional preference for voluntary licensing arrangements. See, *e.g.*, H. Rep. No. 83, *supra*, at 32–33.

The petitioner argues that libraries may continue to photocopy without licenses in the face of a holding that such copying constitutes infringement of the copyright, and rely on the courts to establish reasonable licensing fees in the guise of assessing damages for past infractions (Pet. Br. 29–30). Regardless of the validity of the assumption that libraries will knowingly violate the law, it is far from clear that the courts will adopt petitioner's view that they have the authority to establish a system of compulsory licensing of copyrights in the absence of any statutory recognition of such a system. A finding of such authority with regard to private libraries is particularly unlikely in the face of 17 U.S.C. 101, which contemplates that an injunction against further infringement is the appropriate remedy, and that continuous infringement after notice justifies the assessment of damages in

[38] For example, the library consortium described in petitioner's brief (pp. 19, 26–27), if it indeed were designed to reduce the number of journals purchased by the member libraries and instead to encourage them to exchange photocopies of complete current journals, would be a significantly different type of program from those of NIH and NLM. Therefore, the instant decision would not necessarily establish the validity of such program. See *infra*, n. 49

excess of the maximum otherwise permitted."[39] In sum, the court below correctly concluded that the fashioning of "intermediate solutions," such as compulsory licensing, involves the consideration of economic, social and policy factors more appropriate for legislative than for judicial consideration (Pet. App. 25).

c. The amount and substantiality of the material used. The amount of photocopying is not large in relation to the total size of the libraries. Although the NIH library contains an estimated 5 million journal articles,[40] only 85,744 requests for photocopies were filled in 1970, about 1.7 percent. The proportion of articles photocopied to total library holdings for NLM is even smaller—with a collection many times larger than that of NIH, only 93,746 articles were photocopied in 1970, much less than 1 percent of the total. Moreover, only a single copy of each article is furnished to a requester, excessive copying from a single journal is not permitted, and photocopying of current journals is limited.[41] Thus, the amount of photocopying done by both libraries is strictly limited, and is

[39] These provisions are in sharp contrast to 28 U.S.C. 1498 (b), which provides that the exclusive remedy for infringement by the government shall be an action for damages.

[40] This estimate is based on the assumption that each of the library's 95,000 to 120,000 journal volumes contains about 50 articles. See Adams, *Programs of the National Library of Medicine*, Seminar on Information Storage, Retrieval and Dissemination, New York, Nov. 5, 1964, p. 5.

[41] The median age of articles from petitioner's journals photocopied by NIH is 3 years (Pl. Ex. 12, Tr. 158), and NLM will not fill non-government requests for articles in generally available publications less than 5 years old (Pet. App. 85).

permitted only to the minimum extent consistent with the needs of the library patrons.

Petitioner places primary reliance, in arguing that the photocopying by NIH and NLM is not a fair use, on the fact that entire articles are copied; it argues that there can be no fair use in such circumstances. The Court of Claims properly found this contention "an overbroad generalization, unsupported by the decisions and rejected by years of accepted practice" (Pet. App. 13).

The decisions upon which petitioner relies arose in entirely different contexts, in which the user sought to invoke the fair use doctrine to justify a substantial reliance upon the copyrighted work in the production of a competing publication.[42] Moreover, in none of the cases did the court rely upon the fact that a whole work, rather than a portion of it, had been used.[43]

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[42] These cases would thus be relevant if the recipients of the library photocopies sought to incorporate them in substantial part into their own published articles.

[43] *Folsom* v. *Marsh*, 9 Fed. Cas. 342 (C. Ct., D. Mass.), is, as petitioner notes, one of the earliest recognitions of the doctrine of fair use, arising out of the use of certain letters or parts of letters of George Washington in defendant's biography of him. Mr. Justice Story emphasized that the question is whether the subsequent use of the material is a reasonable one, or whether the user has unfairly profited from the labors of another. The resolution of the question requires the consideration of several factors, including the "value of the materials taken, and the importance of it to the sale of the original work." *Id.* at 348.

In *Benny* v. *Loew's Inc.*, 239 F. 2d 532 (C.A. 9), affirmed by an equally divided Court *sub nom. Columbia Broadcasting System, Inc.* v. *Loew's Inc.*, 356 U.S. 43, the issue was whether a television parody of a work infringed the copyright. The court held that it did, noting that "substantial portions" of the work had been copied (239 F. 2d at 533).

The judgment in *Public Affairs Associates, Inc.* v. *Rickover*,

Similarly, cases in which the fair use defense is available have not distinguished between the use of a whole work or only a portion of it. See *New York Tribune, Inc.* v. *Otis & Co.*, 39 F. Supp. 67 (S.D. N.Y.); *Meeropol* v. *Nizer*, 361 F. Supp. 1063 (S.D. N.Y.).

Finally, it is particularly significant that the cases upon which petitioner relies involve the incorporation of a copyrighted work in a subsequent competing work, while this case involves only the reproduction of single copies for the requester's own use. For reasons stated above (*supra*, pp. 16–21), we believe that, whatever the rule may be in the former situation, the reproduction of entire works is a permissible fair use when single personal copies are involved.

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284 F. 2d 262 (C.A.D.C.), was vacated for an insufficient record by this Court, 369 U.S. 111. The value of the opinion as a precedent is therefore questionable. The case involved the attempt to publish a compilation of copyrighted speeches; the issue was the validity of the copyright. The publisher there sought to profit by the speechwriter's efforts. The district court on remand did not read the prior decisions in the case as indicating that the doctrine of fair use was unavailable because of the extensiveness of the quotations involved. Instead, it relied upon the fact that "there has been no clear showing of the use to which the quotations would be put." *Public Affairs Associates, Inc.* v. *Rickover*, 268 F. Supp. 444, 450 (D.D.C.).

In *Wihtol* v. *Crow*, 309 F. 2d 777 (C.A. 8), the unauthorized arrangement and performance of a copyrighted musical work was held to be an infringement of the copyright, since it unfairly appropriated the author's labors. The court did not place particular emphasis on the fact that the entire copyrighted work was used. Instead, it noted that "it is not conceivable to us that the copying of all, or substantially all, of a copyrighted song can be held to be a 'fair use' merely because the infringer had no intent to infringe." *Id.* at 780. 17 U.S.C. 1(b) specifically

d. *The effect of the use on the potential market for the articles.* Under the carefully limited NIH and NLM programs, the photocopying here has only a minimal effect on the market for the journals. Although there is no need to show actual damages if a copyright has been infringed, *F. W. Woolworth Co.* v. *Contemporary Arts, Inc.*, 344 U.S. 228, absence of economic injury from the use of a copyrighted work is a factor showing fair use.[44] The Court of Claims correctly found that the libraries' photocopying had not damaged petitioner's business.[45]

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reserves to the copyright holder the exclusive right "to arrange or adapt * * * [his copyrighted] musical work * * *."

Finally, in *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 303 (C.A. 2), the court held that the district court should not have granted a preliminary injunction against the use of material from copyrighted magazine articles in a subsequent biography of Howard Hughes, because, *inter alia*, of the potential availability of the defense of fair use.

[44] Nimmer, *Copyright* (1973), § 145; Report of Register of Copyrights, *supra*, p. 25; *Hill* v. *Whalen & Martell, Inc.*, 220 Fed. 359 (S.D. N.Y.).

[45] Subscriptions to petitioner's publications since 1959—when the advent of the xerox machine signaled the start of extensive photocopying—have increased substantially. For example, *Medicine* grew from 2864 subscriptions in 1959 to 5444 in 1969, and *Gastroenterology* grew from 4132 to 7006 in that period (Def. Ex. 102, Tr. 1042). During the period 1967 through 1968, the journal *Gastroenterology* experienced economic losses, but petitioner did not believe that photocopying was a contributing factor (Tr. 97).

In addition, petitioner's business grew at a rate faster than that of the gross national product, or of manpower working in the field of science (Pet. App. 20–21). Petitioner's net sales increased at an average rate of 14 percent between 1959 and 1969; the gross national product increased at a rate of about 9 percent and scientific manpower increased at a rate of about 4 percent (Def. Ex. 103, Tr. 1042). Medical manpower increased

Petitioner contends that photocopying damages it economically by reducing the demand for subscriptions, reprints, and back volumes, and by reducing royalties from photocopying it licenses (Pet. Br. 33–34).[46]

These contentions relate to photocopying in general, not to the restricted NIH and NLM programs, which involve primarily older rather than current issues, and which minimize the impact of photocopying on publishers such as petitioner by copying only one article per request, and by not honoring requests for substantial portions of any single issue or volume. This copying thus is not a substitute for subscription by the researcher to those journals of professional importance to him; the copying cannot be used to supply a current overview of developments in the field. At most, it relieves him of the necessity of maintaining complete files of all the magazines to which he subscribes in order to be sure of having the precise article he may eventually need.[47]

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at a slower rate. For the years 1963 through 1970, the yearly rate of growth in the number of physicians has ranged from 2.5 percent to 2.9 percent. *A Report on Physician Manpower and Medical Education*, American Medical Association, Chicago, Ill., June, 1971.

[46] Petitioner also alleges that photocopying may inhibit the development of new journals (Pet. Br. 33–34). This contention is speculative. Even if true, the market for the journals copied would hardly be adversely affected by inhibiting the development of competing journals.

[47] NLM, by making available articles from journals more than five years old, permits its member libraries to discard out-of-date journals. The space thus saved may enable the library to subscribe to a larger number of journals

The photocopying here is thus part of the essential library function of making available to library users a greater volume of material than they could conceivably purchase and retain by themselves, rather than an invasion of the journal publisher's function of providing a compilation of articles of current interest to a specialized audience.[48] These functions supplement each other; they do not conflict.[49]

In sum, the photocopies do not substitute for a purchased original; they substitute instead for a library loan. Petitioner cannot legitimately complain that the availability of library collections adversely affects its subscription market.

Nor do photocopies supplied by NIH and NLM substantially affect petitioner's market by replacing

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[48] This audience is fully supporting the specialized journal publishers, despite the availability of photocopying. The researchers who requested the articles involved here testified that they personally subscribed to between 4 and 10 journals (Tr. 526, 540, 557, 571).

[49] There is no indication that these libraries would purchase more duplicate subscriptions if they did not supply photocopies. The Court of Claims noted that the duplication rate on requests is generally low (Pet. App. 15, n. 14). Thus, presumably the volumes now owned by the libraries could satisfy the requests if they were circulated. The disadvantages of such circulation (*e.g.*, risk of loss or deterioration of virtually irreplaceable parts of a set, inconvenience of handling the entire volume when only one article is needed, and delays in filling requests, see American Library Association Brief, pp. 6–7), would not be overcome by stocking more copies, even assuming the space for them were available.

Moreover, there is no indication that photocopying has led either library to reduce the number of its subscriptions; NIH subscription costs have more than doubled in six years, n. 8, *supra*. This case is thus significantly different from a library consortium designed to share single subscriptions to various journals. See Petitioner's Brief, p. 19.

sales of reprints. Petitioner regularly sells reprints to the authors when an article is published. Such sales have not been affected by photocopying; instead they have remained essentially constant at least since 1963 (Pet. App. 78).

Moreover, neither petitioner nor the authors apparently consider the distribution of reprints to be a significant source of income. Petitioner does not maintain a stock of reprints of previously published articles, and requests for reprints of such articles are referred initially to the author, who generally distributes them free on request until his supply is exhausted (Pet. App. 78).[50] Thus, the availability of photocopies of specific articles from respondent's libraries relieves the author of a burden and invades no market petitioner seeks to exploit.[51]

Petitioner also asserts that the photocopying deprives it of royalties from the sale of photocopies by its licensees. Again, petitioner's actions have shown that it does not consider this a significant source of income, since requests for reprints are referred to licensees only if reprints or back issues are unavailable elsewhere (Pet. App. 78).[52] In any event, the fact that petitioner has negotiated a licensing agree-

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[50] The record shows that "[t]he supply of reprints and back issues is wholly inadequate" (Pet. App. 19).

[51] Since the libraries supply single articles only, it is highly unlikely that they could supplant any sales of back volumes, containing approximately 50 articles. See n. 40, *supra*. In any event, petitioner evidently does not stock back volumes (Pet. App. 19, 78).

[52] Moreover, petitioner prefers "automatic blanket licensing" to a royalty system (Pet. 37).

ment with respect to some photocopying does not indicate that no other photocopying can be a fair use. Instead, as the Court of Claims emphasized, each program must be analyzed in light of its own particular facts. On the basis of that analysis, the court properly found that the NIH and NLM programs constituted a fair use of petitioner's journals.[53]

[53] This conclusion is consistent with the most recent proposed revision of the Copyright Act, S. 1361, passed by the Senate on September 9, 1974 (120 Cong. Rec. (daily ed.) S16167). Section 107, on fair use, is designed to reflect existing doctrine; it explicitly permits the reproduction of copies for research (S. Rep. No. 983, 93d Cong., 2d Sess., 115, 120–123). Section 108 deals with library photocopying, and, since it specifically authorizes several purposes which are clearly fair uses under current law, it seems designed to reflect, rather than change, the current state of the law.

Proposed Section 108(a) provides that it is not an infringement of copyright for a library to reproduce single copies of copyrighted material under certain conditions, which include the following: that the copy be made without any purpose of commercial gain; that the library collection be open to the public or to all researchers in the field; and that the reproduction or distribution of the work contain a notice of copyright. Subsection (d) authorizes libraries to reproduce and distribute a copy of a single article from a periodical for a user or for interlibrary loan, if the copy becomes the property of the user, the reproducing library has no notice that the copy will be used for a purpose other than study or research, and copyright notices are displayed.

Systematic copying of single articles is prohibited by subsection (g); this provision, as interpreted by the Senate Report accompanying the bill (S. Rep. No. 983, 93d Cong., 2d Sess., 120–123), would not prohibit the photocopying currently practiced by NIH and NLM.

The Senate Report makes clear that the evil being guarded against by prohibiting the systematic photocopying of journal articles by libraries is reduction of the market for the copyrighted work. Thus, the Report explains that "[s]ystematic reproduction or distribution occurs when a library makes copies

In applying the doctrine of fair use, the ultimate question is whether the social policy underlying the Copyright Act—the promotion of science and the useful arts—will be served by permitting the challenged use. We submit that the library photocopying at issue

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of such materials available to other libraries or to groups of users under formal or informal arrangements whose purpose or effect is to have the reproducing library serve as their source of such material. Such systematic reproduction and distribution, as distinguished from isolated and unrelated reproduction or distribution, may substitute the copies reproduced by the source library for subscriptions or reprints or other copies which the receiving libraries or users might otherwise have purchased for themselves * * *" (S. Rep. No. 983, *supra*, at p. 122). Three examples of systematic copying are given. Two are plainly inapplicable: a library with a collection of journals in a field informs other libraries that henceforth it will make copies available, so that other libraries need not subscribe; several branches of a library system agree that different branches will subscribe to different journals and make photocopies available to each other.

Also an example of "systematic" copying is the following: "A research center employing a number of scientists and technicians subscribes to one or two copies of needed periodicals. By reproducing photocopies of articles the center is able to make the material in these periodicals available to its staff in the same manner which otherwise would have required multiple subscriptions" (S. Rep. No. 983, *supra* at p. 122).

As the record in this case indicates, the practices of NIH would not constitute "systematic" copying within the meaning of the above example. NIH does not copy articles to serve as a substitute for subscriptions by doctors employed there. To the contrary, the record indicates that extensive copying from a given issue is prohibited, and that the articles copied averaged three years in age (p. 6 and fn. 41, *supra*). The photocopying practices of NIH do not reduce the number of copies of petitioner's journals the libraries would purchase, and therefore do not constitute "systematic" copying which the new statute would prohibit.

here is a vitally important means of implementing that policy. This view is shared not only by the libraries involved, but also by those primarily responsible for fostering scientific progress—the scientists who write and use the articles.[54] Thus, the court below correctly concluded that "medicine and medical research will be injured by holding these particular practices to be an infringement" (Pet. App. 14). In reaching a result that will avoid such injury, it correctly found the doctrine of fair use applicable.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Claims should be affirmed.[55]

Respectfully submitted.

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NOVEMBER 1974.

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[54] They have indicated, both by individual testimony and through at least one scientific organization, that they believe a finding that the NIH and NLM photocopying at issue here infringed petitioner's copyright would hamper scientific research. See pp. 24–25, *supra*.

[55] If the Court should hold that the NIH and NLM photocopying practices are not a fair use, the case should be remanded to the Court of Claims for a determination of the ownership of the articles involved. See note 21, *supra*, p. 12.

U.S. GOVERNMENT PRINTING OFFICE: 1974

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,

Petitioner,

—against—

THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR PETITIONER

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INDEX

	Page
TABLE OF AUTHORITIES	i
ARGUMENT	1
1. "Access" in Proper Perspective	1
2. The Scope of This Decision	3
(a) The NLM System is a Consortium; NIH is a Large "Corporate" Subscriber	3
(b) Faulty Analogies: Loans and Personal Use	4
(c) Illusory Self-Limitations	7
3. The Xerography Revolution	8
4. The Fair Use Defense Should Not be Extended	9
A. A Different Context	9
B. Traditional Factors	9
(1) The Purpose of the Use and the Nature of the Copyrighted Works	9
(2) The Amount and Substantiality of the Material Used	11
(3) The Effect of the Use on the Potential Market for the Articles	12
CONCLUSION	14
APPENDIX A	A. 1
APPENDIX B	A. 3

TABLE OF AUTHORITIES

CASES:

Alexander v. Irving Trust Co., 132 F. Supp. 364 (S.D.N.Y.), *aff'd*, 228 F.2d 221 (2d Cir. 1955), *cert. denied*, 350 U.S. 996 (1956) 14

Page

Dorr-Oliver, Inc. v. United States, 432 F.2d 447 (Ct. Cl. 1970) 14

Fortnightly Corp. v. United Artists Television, 392 U.S. 390 (1968) 6

Foster v. American Machine & Foundry Co., 492 F.2d 1317 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3208 (Oct. 15, (1974) 2

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STATUTES:

17 U.S.C.

§1 9
§1(a) 6,7
§1(e) 6
§107 5
§209 14

28 U.S.C
§1498(b) 2

Sound Recording Act of 1971, Pub.L. 92-140, 85 Stat. 391 .. 6

CONGRESSIONAL MATERIALS:

SEN. REP. NO. 93-983, 93RD CONG. 2D. SESS. (1974) .. 11, 13, A.3

S. 1361, 93RD. CONG. 2D. SESS. 11
§107 11
§108 11

Page

PERIODICALS:

FINK, *The Place of the Hospital Library Consortium in the National Biomedical Communications Network*, Bull. Medical Library Assn. 258, 259. (July, 1974) 4

GABRIEL, *Surging Serial Costs: The Microfiche Solution*, Library J. 2450 (October 1, 1974) 13

64 *Gastroenterology* 1059 (1973) 3, A.1

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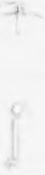
Report of Register of Copyrights on General Revision of U.S. Copyright Law, 87TH CONG. 1ST. SESS. 122–23 (1961) 5



IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,

Petitioner,

—against—

THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR PETITIONER

ARGUMENT

The Government in its brief has expressed its views on what this case involves and what it does not involve, emphasizing at every turn "the special facts of this case" (*e.g.*, Govt. Brief, p. 16), "the context of this case" (*Id.* at 13, n. 22), and "the particular circumstances of this case." (*Id.* at 10). Some of the Government's views will be examined against the background of this case.

1. *"Access" in proper perspective.*

The Government's justification for emasculating petitioner's copyrights may be distilled into one statement—the need of physicians and researchers for "access" to petitioner's jour-

nals. It is erroneously suggested that this case somehow involves an attempt to prohibit photocopying (see, *e.g.*, Govt. Brief, p. 21) and so interferes with "access." But in this case, the Court of Claims under 28 U.S.C. Section 1498(b) has no power to issue an injunction to halt any activity of the Government or anyone else, and petitioner seeks no injunction. If liability is found, the court can only award reasonable compensation in this compulsory licensing case, as it must for other Government takings.[1]

Photocopying of scientific and technical articles on a massive scale is here to stay and petitioner recognizes that the tide cannot be turned back or halted. Indeed, petitioner, as a disseminator of scientific information, affirmatively wishes its articles to be distributed as widely and conveniently as possible—through photocopying or any other technology now or hereafter invented.

These words are documented by petitioner's actions. Petitioner has provided "access" through subscriptions, reprints, microfilm editions, back issues, licensing a photocopier to make authorized photocopies, and proposing workable licensing programs to the library community. In addition, petitioner has urged librarians to suggest improvements in its licensing proposals, thus far without success. In the face of these facts, the Government simply cannot urge that the context of this case requires free photocopies as the only means of access to petitioner's works.[2]

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[1] This Court recently denied certiorari in Foster v. American Machine & Foundry Co., 492 F.2d 1317 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3208 (Oct. 15, 1974) where a compulsory patent license was judicially ordered in a private case.

[2] These photocopies are free only vis-a-vis the authors and publishers of the material being photocopied. The taxpayers shoulder payments to the Xerox Corporation and others costs (F-15, Pet. App. 80).

This case involves solely a minimal impact on Government budgetary considerations (Tr. 174–75). A negligible additional appropriation by the United States would further medical science. The Government would merely complement its photocopying payments to the Xerox Corporation with a small additional payment to the publishers of the material the Government sees fit to reproduce.

The record shows that petitioner's initial attempt to develop a license with NLM resulted in the response that no royalties would be paid unless a court ordered such payments (Tr. 75). Accordingly, this action was commenced. When the Trial Judge ruled in petitioner's favor, petitioner offered a licensing plan with the hope that the principle of licensing would be accepted, shown to be workable, and the problem resolved. The Government rejected not only the plan offered, but *any* plan. In addition, it threatened to destroy access to all of petitioner's journals by cutting off subscriptions and successfully urging others to follow its lead. As a further result, NLM would have excised the journals from *Index Medicus* making it most difficult for the scientific community to learn about the articles published by petitioner.

The Government's response forced petitioner to withdraw its licensing proposal. Petitioner's plan and the Government's response are accurately set out in a letter called to the Court's attention by the Government for other purposes (Govt. Brief, pp. 24–25).[3]

This history makes graphic the need for recognition of a right in the present situation before any meaningful licensing program can be established. In the absence of such recognition, NLM and NIH will, instead of coming forward with constructive contributions, continue to ignore the vicious cycle, described in Petitioner's Brief, p. 16, which will in the end destroy petitioner's valuable journals. The foregoing also emphasizes that access is not jeopardized by the award of reasonable compensation; it might well be jeopardized by denial.

2. *The scope of this decision*

(a) *The NLM system is a consortium; NIH is a large "corporate" subscriber.* In seeking to draw a protective line around

[3] 64 *Gastroenterology* 1059 (1973). The letter is reproduced in full in Appendix A. Petitioner's current licensing proposal adds an alternative of blanket licensing, *i.e.*, a one-time fee paid at the time of subscription which would enable the library to provide photocopies. This fee amounts to considerably less than 5¢ per page.

the photocopying here involved, the Government suggests that this case is "significantly different from a library consortium designed to share single subscriptions to various journals." (Govt. Brief, p. 32, n. 49; p. 26, n. 38). In fact, NLM, and its network of 10 regional libraries and 400 local libraries, are precisely such a consortium.[4] Thus, when NLM's photocopying decreases, its "member libraries" (Govt. Brief, p. 31, n. 47) step up the pace of their reproduction (*Id.*, at 5, n. 14). Moreover, the 12,000 NIH workers, through photocopying, effectively share the two library subscription copies.

The Government quite correctly notes as follows:

> "In a case in which, for example, photocopying was the functional equivalent of publication, presumably there would be copyright infringement." (Brief, p. 17, n. 26, parenthesis omitted).

NLM offers its photocopies to libraries all over the world; NIH furnishes copies to any of its staff who wish them. To be sure, copies are furnished one at a time. But this is the prototype of distribution, *i.e.*, by a bookstore to its customers and by petitioner to its subscribers. The photocopying at NIH and NLM is the functional equivalent of publication (Petitioner's Brief, pp. 48–49; Brief of Authors League of America, p. 14; Brief of *Amici Curiae*, American Guild of Authors and Composers, et al., p. 20–21).

(b) *Faulty analogies: loans and personal use.* A pivot of the Government's position is that the numerous instances of reproduction of journal articles by Government libraries should

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[4] The specific role of NLM in cutting down the need for subscriptions among libraries is reflected in developments recently cited by a librarian as follows:

> "Consortia relationships are equally attractive to NLM where a hierarchical model of information delivery has been proposed to prevent the development of numerous and unnecessary archival collections throughout the nation." Fink, *The Place of the Hospital Library Consortium in the National Biomedical Communications Network*, Bull. Med. Libr. Ass'n., 258, 259 (July 1974).

Prevention of such collections means fewer subscriptions.

be considered fair use because they are equivalent to library loans which concededly do not infringe. To begin with, library loans are not "fair use"; they simply do not come within the ambit of the proprietor's exclusive right to "print," or to "copy". By contrast, photocopying does: it constitutes printing and copying.[5] But reproduction of a copy of a work is not the equivalent of loaning the work for a number of other reasons. For example, it is conceded that the demand by the NIH workers for journal articles is not met by the stuff loans are made of—the two in-house subscription copies (Pet. App. 4). Moreover, the very "disadvantages" of circulating the original pointed out by the Government (Govt. Brief, p. 32, n. 49) confirm that without photocopying, the libraries would have to meet their demand through means which would compensate the copyright proprietor.

There is no similarity between personal use by individuals and the reprint service operated by the Government.[6] The massive NLM network and giant NIH operation have no relationship to casual or sporadic photocopying by an individual researcher of a journal he is perusing, an analogy suggested by the Government and its *amici*.[7] For example, a NLM original of

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[5] In addition to the discussion in Petitioner's Brief, pp. 45–48, these propositions are amply documented in Brief *Amici Curiae* For American Society for Testing and Materials et al. pp. 6–20; Brief of Authors League of America, Inc. pp. 10–14; Brief of *Amici Curiae* American Guild of Authors and Composers et al. pp. 7–20. See page 6, n. 9 infra.

[6] See dissenting opinion of Chief Judge Cowen (Pet. App. 31; 36–37); Petitioner's Brief, p. 41; Brief Amici Curiae of Association of American Publishers, Inc., The Association of American University Presses, Inc., Educational Media Producers Council, p. 9. Even the manufacturing provisions in 17 U.S.C. §107 cited by the Government (Govt. Brief, p. 19, n. 29) limit importation for individual use to authorized copies; "piratical copies"—those made without permission of the copyright proprietor—may not be imported even one at a time. Although the manufacturing provisions are "an anomaly in our copyright law," Report of Register of Copyrights on General Revision of U.S. Copyright Law, 87th Cong. 1st Sess. 122–23 (1961), they at least make it clear that Congress knows how to provide individual use copyright exemptions when it sees fit.

[7] The inherent limitations on hand copying restrict this activity to note

a periodical is not, in fact, available to an individual to borrow, peruse, and photocopy for himself. Nor is it even physically available to an NLM member library. NLM's subscription copy is, in effect, a "master" for making reprints.

If reproduction through library photocopying can ever be infringement, the scope and function of the Government's system make this the case.

The analysis of this Court in *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968), in no way immunizes the libraries from liability in this case. To begin with, the libraries themselves initiate and generate the reproduction by determining whether to lend the original or to photocopy instead. Moreover, the entire process of reproduction—including photographing the article onto microfilm and printing a copy from the film—is performed entirely by the libraries, in contrast to the intermediate role between broadcaster and viewer played by the cable operator.[8] Furthermore, the cable operators' function was deemed insufficient in *Fortnightly* to justify expanding the dictionary meaning of "perform"; here, the plain meaning of "copy" and "print" squarely covers the Government's operation.[9]

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taking, not reproducing entire articles by hand. And the home recording permitted by the Sound Recording Act of 1971, Pub. L. 92-140, 85 Stat. 391 discussed by the Government (Brief, p. 18 and 19) is based on purposeful statutory language. The remarks in the committee report about rights of other proprietors under existing Title 17 relate to recording rights held by music copyright owners, not to rights of proprietors in other kinds of works. The distinctions between music and periodicals, including the statutory compulsory license in Section 1(e), make such remarks inapplicable to the present case.

[8] The copying and printing by libraries here is similar to the performing by broadcasters who concededly infringe if they broadcast without permission. The function of the cable operator is closer to that of the photocopying machine manufacturer, the paper manufacturer or the electric company furnishing current in a photocopying operation.

[9] The Government does not believe it necessary for this Court to decide certain issues raised below. These include whether the words "copy," "print," and "publish" in Section 1(a) of the statute are capable of protecting owners of copyright in book and journals against photocopying (Govt. Brief, p. 17, n. 26). The Government thus suggests bypassing an issue which according to the

(c) *Illusory self-limitations.* The purported self-limitations of the libraries are irrelevant and illusory. The factual and legal fallacy of the "single copy" euphemism is shown at pages 40 to 42 of Petitioner's Brief and pages 10–13 of the Authors League Brief. The request must, of course, be in writing (Government Brief, p. 2) and the 40 or 50 page per article limitation applies—except in the case of long articles! (Pet. App. 80–81, Tr. 179A).

Equally illusory is the "widely available" list of certain journals less than five years old (Finding 22(b); Pet. App. 85), a purported source of rejections for photocopying at NLM (not NIH).[10] The list is wholly inapplicable to Government libraries—an exception so wide as to render the rule meaningless. As to non-Government libraries, the list is simply ignored, *inter alia*, "if the requester has been unsuccessful in obtaining the journal elsewhere" (*id*), or in other words, every time it matters.

The Government suggests that the thrust of its libraries' programs is the furnishing of out-of-date articles (Brief, pp. 6, 11, 31). This suggestion is not documented by the record or common experience. Indeed, if the median age of articles from petitioner's journals were three years, as suggested by the Government (Brief, p. 6), then half are less than three years old. These are current journals, particularly in the context of a proprietor's

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Court of Claims majority "must be taken into account" as a factor in finding fair use (Pet. App. 9, 23). The "solid doubt" and "grave uncertainty" of the majority on this issue may be put to rest by the judicial construction of these terms, cited in Chief Judge Cowen's dissenting opinion (Pet. App. 31–33) and in Petitioner's Brief (pp. 46–49) and by the detailed historical analysis contained in the *amicus* brief submitted by the American Guild of Authors and Composers, et al. (pp. 11–16; 23–28). Both judicial comment and history supports the plain meaning of the words used in Section 1(a) of the statute to specify rights; photoduplication is accordingly "copying," "printing," and "reprinting" and, as practiced by NIH and NLM, "publication" as well. Petitioner believes this Court should remove the uncertainty raised by the Court of Claims and confirm such plain meaning.

[10] Petitioner's "widely available" journals have total individual and library subscriptions ranging from 3100 to 7000 (F-5(a); Pet. App. 73; F-7; Pet. App. 76).

right to enjoy his copyright while it is useful (with an outer limit of 56 years).

There is no suggestion that the purported limitations prevent any user from securing a photocopy; in other words, the limitations do not limit.[11]

3. *The xerography revolution*

The Government recognizes that in 1959, "the advent of the xerox machine signaled the start of extensive photocopying" (Brief, p. 30, n. 45). This parallels its statement below that in 1958 "there was virtually no photocopying as presently practiced . . . " (Defendant's Brief in Court of Claims at 46; see also discussion by the Court of Claims majority, Pet. App. 17, 18). These concessions render irrelevant any discussion of the library photocopying situation in 1935 (*e.g.*, Govt. Brief, pp. 17–18) or even earlier (*Id.*, p. 17, n. 26). The two quotations from the so-called "gentlemen's agreement" (at page 18 of the Government Brief) make it clear that an attempt was being made to excuse machine reproduction in 1935 "of a part" of a work when substituting for note taking by hand; rapid, inexpensive copying of entire articles was not yet possible. (See Petitioner's Brief, p. 43, n. 30).

To equate pre-Xerox copying with the post-Xerox copying era is to classify both the slingshot and the atomic bomb as weapons. While in a sense accurate, such an analysis misses the point that the technology has changed the realities.

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[11] The Government has described the photocopying policies of the Library of Congress as to permit copying unless permission is expressly refused by the copyright holder (Govt. Brief, p. 6, n. 16). The evidence on the subject actually in the record is a Library of Congress directive that "copyright material will ordinarily not be copied without the signed authorization of the copyright owner" (F-44, Pet. App. 103). Historical analysis shows that this general rule against photocopying of copyrighted materials has been Library of Congress policy since it commenced operations of its photoduplication service (See Brief of American Guild of Authors and Composers, et al., pp. 25–26).

4. *The fair use defense should not be extended*

A. *A different context*

The Government argues: "This case is very different from those in which the doctrine of fair use is ordinarily involved"[12] (Govt. Brief, p. 16). Petitioner agrees. Fair use has traditionally been considered when a writer quotes from or paraphrases earlier sources. According to the Government, the present situation "involves numerous instances of the single reproduction of a copyrighted work for the individual use of the requestor." (*Id.*). Extension of the fair use defense to this situation is wholly unwarranted. See Petitioner's Brief pp. 19–27; Authors League Brief, pp. 15–23. But these "numerous instances" of reproduction are the equivalent of publication and distribution, petitioner's primary means of serving its public. Such reproduction is concededly "a separate medium for distribution of journal articles." (See Brief of American Library Association, p. 45). Petitioner is in the business of distributing journal articles. There is no reason this particular medium should be exploited by Government libraries free of charge. If such operation is excused by extending the fair use exception to section 1 rights, the exception would consume the rule.

B. *Traditional factors:*

(1) *The purpose of the use and the nature of the copyrighted works.* The Government accurately states: "The copyrighted works are purely scientific. . . ." (Govt. Brief, p. 23). Thus the Government, in effect, concedes that the uses made here are by persons who constitute petitioner's market. The purposes of such uses are the very purposes for which compensation is normally sought.[13] For example, the copies are passed on to

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[12] The American Library Association agrees that the present case "differs from those in which the criteria [of fair use] have heretofore been applied." (American Library Association Brief, p. 35).

[13] Compensation for every use counts, particularly where a universally recognized journal such as *Medicine* has only 4,500 subscribers and a subscription price of $12 for six issues (Tr. 85–86).

others, used to produce further photocopies for colleagues (Tr. 547) or maintained in the ultimate user's files interchangeably with reprints and are even called "reprints" by some users (Tr. 1354).

Nonprofit scientific institutions are petitioner's potential market; accordingly, the nonprofit nature of Government libraries is irrelevant. But in addition, it must be remembered that at least 12% of NLM's "customers" are commercial, profit-making enterprises such as drug companies. Finally, regardless of the admitted social value of the practice of medicine in this country, physicians do not normally operate on a nonprofit basis.

Publication of "purely scientific" journals by respected private groups is in the public interest; the knowledge therein will be effectively disseminated because publication in such journals—as opposed, for example, to the Government Printing Office publications—necessarily bears the stamp of quality (Tr. 909). The financial health of such journals is, accordingly, a matter of public concern.

It is in this context that one must read judicial comment about latitude to science under the fair use doctrine; latitude is accorded a writer of scientific works who should be encouraged to comment upon earlier works.[14]

The Government appears to argue that the very uncertainties created by the decision below will encourage negotiation of voluntary agreements among publishers and libraries (Govt. Brief, p. 25). But the decision below, while by a narrowly divided court, is not at all unclear: As stated by Judge Nichols, the majority decision "[h]owever hedged, . . . will be read, that a copyright holder has no rights a library is bound to respect" (Pet. App. 69). This is because, as discussed above, the holding

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[14] References to such writers and comment dominate the Government's discussions and references on pp. 23–24 of its Brief.

excuses a massive system of photoduplication as "fair use" with no realistic limitations which would dictate a contrary result in other situations.[15]

This is made nowhere clearer than in the detailed discussion by the Government of "systematic reproduction" found in S.1361 passed by the Senate on September 9,1974, and the accompanying Senate Report. (Govt. Brief, p. 34–35, n. 53). The Senate bill seeks to codify the existing law of fair use in Section 107 and then, contrary to the Government's assertion, goes *beyond* fair use in Section 108 to grant specific exemptions to libraries. Such special exemptions, however, do not extend to "systematic reproduction," examples of which are given in SEN. REP. NO. 93–983 93RD CONG. 2D SESS. at 122. The two which the Government dismisses as "plainly inapplicable," apply to NLM. For example, NLM effectively informs medical libraries that it makes photocopies available, so that the receiving library need not subscribe. Moreover, NIH is virtually the prototype for the other example, when it is recalled that the 12,000 users at NIH are being served by the one or two in-house subscription copies through NIH's systematic reproduction activities. Since §108 by its terms would give no special exemption to the libraries in this case, the fair use issue here raised would be determinative even if S.1361 were law.[16]

(2) *The amount and substantiality of the material used.* The Government states that "the amount of photocopying is not large in relation to the total size of the libraries." (Govt. Brief, p. 27). But the criterion as correctly stated earlier by the Government (*Id.*, at 22) is "the amount and substantiality of the material used *in relation to the copyrighted work as a whole.*"

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[15] Other consortiums and networks of libraries will thus be encouraged to proceed without compensating authors and publishers.

[16] Despite the Government's lengthy footnote (Govt. Brief p. 34–35, n. 53), it is believed appropriate to submit to the Court the entire Committee discussion on the subject of multiple copying and systematic reproduction. It is accordingly printed in Appendix B.

[Emphasis added] Under this criterion, the amount is total. Petitioner does not have to argue that "there can be no fair use in such circumstances" (Govt. Brief, p. 28); petitioner rather argues that there never has been any finding of fair use in such circumstances. In any event, the size of the library no more supports a finding of fair use than the size of a book store or publishing house or printing plant which distributes or reproduces copies of copyrighted works without authorization.

(3) *The effect of the use on the potential market for the articles.* Recognizing that "there is no need to show actual damages" generally in copyright infringement cases, the Government argues that the rules are changed when the wand of fair use is waved (Brief, p. 30). Neither the authorities cited nor any other makes "economic injury" a factor relating to fair use; rather, from the time of Mr. Justice Story onward, courts have analyzed the quantity and quality of copyrighted material taken in order to determine whether such use could substitute for the original and thereby affect its potential market (see Petitioner's Brief, pp. 21, 25, 32). It is such a potential, rather than "economic injury" which has been considered relevant to a consideration of fair use.

Actually, petitioner has been harmed and the Trial Judge was correct in so finding.[17] The Government implicitly concedes that photocopying current issues would have an impact on

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[17] The statements dotting pages 30 through 33 of the Government's Brief require corrections too numerous to list. For example, in some discussions petitioner may not have discussed photocopying in connection with the economic losses experienced by *Gastroenterology* (Tr. 97; see Govt. Brief, p. 30, n. 45), but both petitioner and others do ascribe losses and nongrowth of subscriptions, sales of reprints and back volumes, as well as loss of photocopying royalty income to library photocopying—all with a potentially harmful effect on medical journals (Tr. 72–73; 436, 986–87; 1299; 1301–02; Pl. Exh. 34; Def. Exh. 85-5). Neither can one expect NLM's "member libraries" to forsake their archival function and discard out-of-date journals. (Govt. Brief, p. 31, n. 47). Even if they did, they would undoubtedly need microfilm editions which have been licensed by petitioner (F-36, Pet. App. 92).

publishers such as petitioner. But NIH and NLM do copy current issues to a considerable extent. Moreover, the argument that reprint sales "have remained essentially constant at least since 1963" (Government Brief, p. 33) is in itself significant since a dramatic increase would have been expected during this period. Moreover, the NLM director has conceded that the consequences of extensive photocopying services may well be that the researcher finds it necessary to request fewer reprints of articles (Tr. 503).

Much of the "economic" argument of the Government and its *amici* relates to their continuing and unsuccessful effort to show that photocopying does not affect subscriptions.[18] This loses sight of the key fact that many publishers experience a net loss in the normal sale of volumes and recoup only on variant forms of exploitation, i.e., "subsidiary rights." This situation will become increasingly applicable to small scholarly journals such as those involved here.[19] This lawsuit was brought to broaden the fragile base of financial support for such journals by seeking compensation for the particular medium of distribution being exploited by the Government in this case.

If the copying by NLM for libraries throughout the nation and the world and the massive copying by NIH for its large staff is not infringement, then copyright has become a mere shadow instead of a basic right required to give worthy scientific publishers an opportunity to survive.

[18] In defining "systematic reproduction", the Senate Report does not focus solely on substitution of inter-library photocopying for subscriptions; it also refers significantly to "reprints or other copies which the receiving libraries or users might otherwise have purchased for themselves, from the publisher or the licensed reproducing agencies." SEN. REP No. 93-983 *supra* at 122. See A. 3.

[19] Income from licensed photocopying is necessary to recoup losses from library networking. These losses have been recognized in a recent article by a librarian as follows:

"... a growing number of libraries no longer can justify a ballooning periodicals budget and have lavishly cancelled subscriptions and foregone new offerings, depending instead on networks to supply timely and inexpensive photocopies of virtually anything." Gabriel, *Surging Serial Costs: The Microfiche Solution.* Library J. 2450. (Oct. 1, 1974).

CONCLUSION

For all of the reasons stated in Petitioner's Brief and in the foregoing Reply Brief for Petitioner, the judgment of the Court of Claims should be reversed and the case remanded for a determination of reasonable compensation to be paid to petitioner by the Government.[20]

Respectfully submitted,
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[20] The Government does not believe it necessary for this Court to decide whether petitioner is the owner of copyright in the articles in its journals (Govt. Brief, p. 12, n. 21). Petitioner believes the Trial Judge correctly decided that petitioner was the owner and that this issue need not be reviewed by this Court. The Trial Judge's finding of petitioner's ownership and right to sue was compelled by petitioner's record ownership, *cf.* Dorr-Oliver, Inc. v. United States, 432 F.2d 447 (Ct. Cl. 1970); Widenski v. Shapiro Bernstein & Co., 147 F.2d 909 (1st Cir. 1945), as well as the presumptions flowing from Section 209 of the copyright statute, *e.g.*, Hedeman Products Corp. v. Tap-Rite Products Corp., 228 F. Supp. 630 (D.N.J. 1964), and is supported by testimony in this case (*e.g.*, Tr. 25, 87, 169, 423), *Cf.* Alexander v. Irving Trust Co., 132 F. Supp. 364 (S.D.N.Y.), *aff'd*, 228 F.2d 221 (2d Cir. 1955), *cert. denied*, 350 U.S. 996 (1956) (Presumption that publisher of the "Medical Journal" became proprietor of copyright in article submitted without reservation).

Both parties thus agree this Court may appropriately focus on the infringement and fair use issues raised by this record. These issues would be the same regardless of whether authors or publishers sued (See Authors League Brief, p. 2). Similarly, the license referred to by the Government (Brief, p. 3, n. 3) is completely inapplicable to certain counts in the Court of Claims petition (and is also inapplicable to many other scientific journal articles); accordingly, such license in no way avoids the necessity of resolving the fair use question now or in the future.

APPENDIX A

Letter to the editor, 64 *Gastroenterology* 1059 (1973).

THE AGA AND THE PHOTOCOPYING CONTROVERSY

Dear Sir:

In 1968, the publisher of *Gastroenterology*, The Williams & Wilkins Company, filed suit against the United States Government for infringement of copyrights on its medical journals resulting from unauthorized reproduction by photocopying equipment by the National Library of Medicine. The ruling on this suit by the Commissioner to the Court of Claims on February 16, 1972 in favor of Williams & Wilkins has caused an outpouring of protests from government agencies, biomedical libraries, the editors of other journals, and from members of our own association, all contending that the requirement of a royalty payment or licensing fee to the owner of the copyright would represent an obstruction to the free flow of scientific information to which our own and similar scientific societies are dedicated.

Pending appeal of the Commissioner's ruling to a higher court, Williams & Wilkins had at first proposed to act upon the ruling by (a) raising the journal subscription rate to institutions, and (b) requiring a 5 cents per page fee for interlibrary loan reproduction. The institutional rate was intended to include a "license" to reproduce for these purposes and at the rate specified. The Director of the National Library of Medicine has reacted to these proposals by declarations that he would terminate the Library's subscription to *Gastroenterology* and other Williams & Wilkins journals, and discontinue the indexing of these journals in the Index Medicus. A number of other libraries indicated their intention to terminate their subscriptions.

During the summer of 1972 discussions between Williams & Wilkins and the National Library led to an understanding that the publisher would (1) abandon its stipulation that the new institutional subscription rates include a license to photocopy,

and (2) abandon its proposal for an interlibrary loan fee of 5 cents per page, until the appeal of its case has been heard in the courts. The Director of the National Library of Medicine has informed us that, given this position on the part of Williams & Wilkins, they will continue to subscribe to and index our journal.

The Committee on Publications and Communications of AGA, in reporting to the Governing Board on this matter, found that they shared a grave concern over the threat thus posed to the utilization and the stature of our journal. While holding high respect for our publisher and great confidence, after nearly 30 years of a close working relationship, in his integrity and dedication to scientific interchange, we believe that the use of copyright as a basis for restriction of photocopying would impede the free flow of scientific information in our field, to which our Association is specifically dedicated. We believe that if financial losses can be shown to be attributable to photocopying, they can and should be compensated for by raising rates for institutional subscriptions. We would point out that changes in subscription rates are matters in which we as sponsors of the journal must be consulted and that the surcharge now applied to institutional subscriptions to *Gastroenterology* is modest by comparison with the rates of most other journals. We understand that negotiations are continuing among Williams & Wilkins, the National Library of Medicine, and the Medical Library Association in search of an equitable resolution of the photocopying issue.

The opinions expressed above are a consensus of the Governing Board of AGA, of the members of this Committee, and of the Editorial Board of *Gastroenterology*. Since the Committee is vitally concerned that it reflects the opinions of our membership, we would be pleased to have expressions of opinion on this issue.

THOMAS P. ALMY, CHAIRMAN
Committee on Publications
and Communications
American Gastroenterological Association
Dartmouth Medical School
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APPENDIX B

Sen. Rep. No. 93-983, 93rd Cong. 2d. Sess. (1974).

SECTION 108. REPRODUCTION BY LIBRARIES AND ARCHIVES

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Multiple Copies and Systematic Reproduction

Subsection (g) provides that the rights granted by this section extend only to the "isolated and unrelated reproduction of a single copy", but this section does not authorize the related or concerted reproduction of multiple copies of the same material whether made on one occasion or over a period of time, and whether intended for aggregate use by one individual or for separate use by the individual members of a group. For example, if a college professor instructs his class to read an article from a copyrighted journal, the school library would not be permitted, under subsection (g), to reproduce copies of the article for the members of the class.

Subsection (g) also provides that section 108 does not authorize the systematic reproduction or distribution of copies or phonorecords of articles or other contributions to copyrighted collections or periodicals or of small parts of other copyrighted works whether or not multiple copies are reproduced or distributed. Systematic reproduction or distribution occurs when a library makes copies of such materials available to other libraries or to groups of users under formal or informal arrangements whose purpose or effect is to have the reproducing library serve as their source of such material. Such systematic reproduction and distribution, as distinguished from isolated and unrelated reproduction or distribution, may substitute the copies reproduced by the source library for subscriptions or reprints or other copies which the receiving libraries or users might otherwise have purchased for themselves, from the publisher or the licensed reproducing agencies.

While it is not possible to formulate specific definitions of "systematic copying", the following examples serve to illustrate some of the copying prohibited by subsection (g).

(1) A library with a collection of journals in biology informs other libraries with similar collections that it will maintain and build its own collection and will make copies of articles from these journals available to them and their patrons on request. Accordingly, the other libraries discontinue or refrain from purchasing subscriptions to these journals and fulfill their patrons' requests for articles by obtaining photocopies from the source library.

(2) A research center employing a number of scientists and technicians subscribes to one or two copies of needed periodicals. By reproducing photocopies of articles the center is able to make the material in these periodicals available to its staff in the same manner which otherwise would have required multiple subscriptions.

(3) Several branches of a library system agree that one branch will subscribe to particular journals in lieu of each branch purchasing its own subscriptions, and that the one subscribing branch will reproduce copies of articles from the publication for users of the other branches.

The committee believes that section 108 provides an appropriate statutory balancing of the rights of creators, and the needs of users. However, neither a statute nor legislative history can specify precisely which library photocopying practices constitute the making of "single copies" as distinguished from "systematic reproduction". Isolated single spontaneous requests must be distinguished from "systematic reproduction". The photocopying needs of such operations as multicounty regional systems, must be met. The committee therefore recommends that representatives of authors, book, and periodical publishers and other owners of copyrighted material meet with the library community to formulate photocopying guidelines to assist library patrons and employees. Concerning library photocopying practices not authorized by this legislation, the committee recommends that workable clearance and licensing procedures be developed.

In adopting these provisions on library photocopying, the committee is aware that through such programs as those of the National Commission on Libraries and Information Science there will be a significant evolution in the functioning and services of libraries. To consider the possible need for changes in copyright law and procedures as a result of new technology, title II of this legislation establishes a National Commission on New Technological Uses of Copyrighted Works. It is the desire of the committee that the Commission give priority to those aspects of the library-copyright interface which require further study and clarification.

(Slip Opinion)

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SUPREME COURT OF THE UNITED STATES

No. 73–1279

The Williams & Wilkins Company, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Claims.

[February 25, 1975]

PER CURIAM.

The judgment is affirmed by an equally divided Court.

MR. JUSTICE BLACKMUN took no part in the decision of this case.